# Supreme Court of the United States

OCTOBER TERM 1924.

NO. 349.

REUBEN WELLER,

*Plaintiff-in-Error,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK,

*Defendants-in-Error.*

IN ERROR TO THE COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK, STATE OF NEW YORK.

## POINTS FOR PLAINTIFF-IN-ERROR.

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*Of Counsel.*

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## Cases and Authorities

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## POINTS FOR PLAINTIFF-IN-ERROR.

This is a criminal action brought by the People of the State of New York against Weller, the plaintiff-in-error, on an information filed in the Court of Special Sessions of the City of New York for an alleged violation of Sections 168 to 174 of the General Business Law, added by Chapter 590 of the New York Laws of 1922, in that Weller was engaged in the business of selling theatre tickets without a license and without filing a bond, as required by the statute (*Rec., pp. 1, 2, 28*). Judgment of conviction was rendered on February 16, 1923, imposing a fine of $25 or imprisonment for five days upon the failure to pay such fine.

On appeal from this judgment the Appellate Division of the Supreme Court on November 30, 1923, rendered judgment of affirmance, and on a further appeal to the Court of Appeals that Court likewise affirmed the judgments of the lower courts. The record was thereupon filed in the Court of Special Sessions and judgment was rendered there against the plaintiff-in-error on the remittitur from the Court of Appeals (*Rec., pp. 54, 55*).

No opinion was written by the Court of Special Sessions. The opinion of the Appellate Division, from which Presiding Justice Clarke and Mr. Justice Finch dissented, is reported in 207 App. Div. Rep. at pages 337 to 354.

The opinion of the Court of Appeals, from which Judge Andrews dissented, is reported in 237 N. Y. at pages 316 to 332.

The constitutionality of the act claimed to have been violated is challenged on the grounds stated at *pages 25-26* of the Record.

For the convenience of the Court the text of the act follows:

## The Statute Challenged.

"Sec. 167. *Matters of public interest.* It is hereby determined and declared that the price of or charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses.

"Sec. 168. *Reselling of tickets of admission; licenses.* No person, firm or corporation shall resell or engage in the business of re-

selling any tickets of admission or any other evidence of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held without having first procured a license therefor from the comptroller. Such license shall be granted upon the payment by or on behalf of the applicant of a fee of one hundred dollars and shall be renewed upon the payment of a like fee annually. Such license shall not be transferred or assigned, except by permission of the comptroller. Such license shall run to the first day of January next ensuing the date thereof, unless sooner revoked by the comptroller. Such license shall be granted upon a written application setting forth such information as the comptroller may require in order to enable him to carry into effect the provisions of this article and shall be accompanied by proof satisfactory to the comptroller of the moral character of the applicant.

"Sec. 169. *Bond. The comptroller shall require the applicant for a license to file with the application therefor a bond* in due form to the people of the state of New York *in the penal sum of one thousand dollars*, with two or more sufficient sureties, who shall be freeholders within the state of New York, *conditioned that the obligor* will not be guilty of any fraud or extortion, *and will not exact or receive a price for any such ticket or evidence of the right of entry in excess of the price authorized by this article*. The comptroller shall keep books wherein shall be entered in alphabetical order all licenses granted and all bonds received by him as provided for in this article, the date of the issuance of such licenses and the filing of such bonds, which record shall be open to public inspection. A suit to recover on the bond required to be filed by the provisions of this

article may be brought by the comptroller or on the relation of any party aggrieved in a court of competent jurisdiction *and in the event that the obligor named in such bond has violated any of the conditions of such bond, recovery for the full penal sum of such bond may be had in favor of the people of the state.*

"Sec. 170. *Revocation of licenses.* In the event that any licensee shall be guilty of any fraud or misrepresentation *or shall charge for any ticket a price in excess of the price authorized by this article* or otherwise violate any of the provisions of this article or any other law or local ordinance, *the comptroller shall be empowered,* on giving ten days' notice by mail to such licensee, and on affording such licensee an opportunity to answer the charges made against him, *to revoke the license issued to him.*

"Sec. 171. *Supervision of comptroller.* The comptroller shall have the power, upon complaint of any citizen or of his own initiative, to investigate the business, business practices and business methods of any such licensee if in the opinion of the comptroller such investigation is warranted. Each such licensee shall be obliged, on request of the comptroller, to supply such information as may be required concerning his business, business practices or business methods.

"Sec. 172. *Restriction as to price. No licensee shall resell any such ticket* or other evidence of the right of entry to any theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are given *at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry.* Every person, firm or corporation who owns, operates or controls a theatre, place of amusement or entertainment, or other place where public exhi-

bitions, games, contests or performances are held shall, if a price be charged for admission thereto, print on the face of each such ticket or other evidence of the right of entry the price charged therefor by such person, firm or corporation.

"Sec. 173. *Violations; penalties.* Every person, firm or corporation who resells any such ticket or other evidence of right of entry or engages in the business of reselling any such ticket or other evidence of the right of entry, without first having procured the license prescribed *and filing of a bond required by this article* shall be guilty of a misdemeanor. *Every person, firm or corporation who violates any provisions of this article shall be guilty of a misdemeanor.*

"Sec. 174. *Constitutionality of article.* In case it is judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall not affect the validity or effect of the remaining provisions of the article.

"Sec. 2. This act shall take effect immediately."

## The Nature of the Service Rendered by Ticket Brokers.

The business of ticket brokerage has been carried on in the City of New York for more than sixty years. A considerable number of responsible men are engaged in it (*Rec., p. 5*). They maintain offices in hotels and other prominent localities, for the convenience of their patrons, where they engage bookkeepers, stenographers, salesmen and messengers (*Rec., p. 8*). They operate private telephones to the various theatres and have attendants upon the telephones to facilitate communication. They secure for their patrons

such tickets as they desire, in so far as they are procurable and, wherever practicable, deliver them at the homes or places of business of the purchasers (*Rec., p. 9*). If they themselves are not possessed of the tickets called for they secure them from those who on inquiry are found to have them, if they are to be had (*Rec., p. 9*). They carry charge accounts for their regular customers, to whom they extend credit. They serve those who are hard of hearing or whose eyesight is bad and who would not be apt to get the accommodations suited to their infirmities at the theatre box office (*Rec., p. 10*). They also supply tickets to out of town customers and to strangers stopping at the various hotels, who otherwise would be unable to secure tickets on short notice (*Rec., p. 11*).

The persons dealing with the brokers are thus spared the insufferable annoyance and the serious loss of valuable time incident to standing in line at the box offices of the various theatres, to discover eventually that the theatre is unable to supply them with seats in the locations desired, or for the evening suiting their convenience or preference (*Rec., pp. 10-11*).

The expense of carrying on the business of the broker is very large. One of the brokers testified that his annual disbursements amount to $156,000 (*Rec., p. 8*), and that he sustains large losses annually because of his inability to dispose of tickets which he has been compelled to purchase by the theatre managers, and from the fact that he permits his customers to return any tickets supplied, until 8 o'clock of the evening to which they relate (*Rec., pp. 11-12*).

The ticket brokers to a great extent are compelled to help the theatre owners to finance their productions. When a new play is to be produced,

even before anything is known as to its qualities or as to who is to appear in it, the theatrical managers require the brokers to buy a designated number of tickets for eight weeks in advance (*Rec., pp. 5, 6, 7*) at a price fixed by the managers. These tickets are paid for in advance by the brokers to the extent of hundreds of thousands of dollars annually. If the play for which tickets are allocated by the theatrical managers is not a success, a large proportion of the tickets is left on the brokers' hands with resultant financial loss. In many instances the play continues, even though it be unpopular, at the expense of the brokers (*Rec., p. 8*).

So far as their customers are concerned the brokers render valuable service, and no complaints are made by those who obtain the benefit of such service.

As indicative of the necessity of maintaining a large staff to conduct the business, David Marks testified that for every seven persons who come into his place of business or who communicate with him over the telephone, only one sale is made, owing to the fact that he is unable to comply with their requirements, most of them desiring front seats for some selected and usually popular performance on a designated evening (*Rec., p. 8*).

The result of Weller's operations from January 1, 1921, to October 31, 1922, shows that his business was conducted at a considerable loss (*Rec., pp. 13, 14*).

## The Action of Governor Miller on the Bills of 1921 and 1922.

At the Legislative session of 1921 a bill similar to the act now under consideration was passed by

the Legislature but was vetoed by Governor Miller in the following memorandum:

"State of New York
Executive Chamber
Albany

February 28, 1921.

"To the Assembly:

"I return herewith without my approval, Assembly Bill, Int. No. 158, Pr. No. 158, entitled—

'An Act to amend the general business law, in relation to the sale of tickets of admission to theatres and places of amusement.'

"Theatre tickets are articles of commerce (*People ex rel. Tyroler* vs. *Warden of Prison*, 157 N. Y., 116; *Collister* vs. *Hayman*, 183 N. Y., 250; *People ex rel. Fleischmann* vs. *Caldwell*, 168 N. Y., 671). Any attempt by the State, therefore, to regulate the price at which theatre tickets may be sold or resold, must be in the exercise of police power. No ground for such exercise has been called to my attention. Although I stated on the oral argument before me that my impressions were against the constitutional validity of the bill and gave time for the filing of briefs, my attention has not been called to any grounds upon which exercise of power can be supported and I am unable to discover any.

"Justice Rosalsky in the case of *Matter of Newman*, 109 Misc., 622 decided that a municipal ordinance which provided for a license to engage in the business of selling tickets of admission to exhibitions or performances and forbidding a licensee to sell a ticket for any greater amount than fifty cents in excess of the regular established price was invalid. *The reasons given by Justice Rosalsky in support of his conclusion are applicable to this bill and*

*appear to me to be so cogent as to permit no other conclusion.*

I am satisfied that this bill is unconstitutional and it is, therefore, disapproved.

(Signed) NATHAN L. MILLER."

In 1922, whilst formally approving the act now attacked, Governor Miller expressed his views as to its constitutionality in the following memorandum:

"State of New York
Executive Chamber
Albany

April 22, 1922.

Memorandum filed with Senate Bill, Introductory Number 598, Printed Number 1193, entitled—

'AN ACT to amend the general business law, in relation to the sale of tickets of admission to theatres and places of amusement.'

*Approved*:

This bill is like one disapproved by me last year in the respect that it limits the price at which a theatre ticket broker may re-sell a ticket. It differs from that in the respect that it provides for licensing such brokers and declares that the subject-matter is affected with a public interest.

The licensing feature by itself is undoubtedly valid. I thought that the limitation upon the re-sale price was invalid, and although I invited the sponsors of the bill last year to submit a brief in support of the constitutionality of the bill, none was forthcoming. Eminent counsel have recently submitted to me a brief containing at least plausible arguments in support of the bill. I have concluded to

give them a chance to address these arguments to a court, inasmuch as the bill is aimed at an undoubted abuse and at least one provision of it is probably valid.

The bill is approved.

(Signed) NATHAN L. MILLER."

## Assignments of Error.

The plaintiff-in-error filed the following assignments of error (*Rec.*, pp. 56-57) viz. that the court below erred.

First. In adjudging that Chapter 590 of the Laws of 1922 is a constitutional act.

Second. In adjudging that Chapter 590 of the Laws of 1922 of the State of New York did not deprive the plaintiff-in-error of his liberty without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Third. In adjudging that Chapter 590 of the Laws of 1922 of the State of New York did not deprive the plaintiff-in-error of his property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Fourth. In adjudging that Chapter 590 of the Laws of 1922 of the State of New York did not deny to the plaintiff-in-error the equal protection of the law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Fifth. In adjudging that Chapter 590 of the Laws of 1922 of the State of New York did not

deprive the plaintiff-in-error of his lawful occupation and livelihood without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Sixth. In failing to adjudge that Chapter 590 of the Laws of 1922 of the State of New York deprived the plaintiff-in-error of his liberty and property without due process of law, and denied to him the equal protection of the law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Seventh. In refusing to render judgment in favor of the plaintiff-in-error on the ground that Chapter 590 of the Laws of 1922 of the State of New York was unconstitutional and void because it deprived the plaintiff-in-error of his liberty and property without due process of law and denied to the plaintiff-in-error the equal protection of the law under Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it:

(A) Deprives the plaintiff-in-error of his liberty and property without due process of law by interfering with his following a lawful occupation from which he derives his livelihood by the sale of his services in procuring tickets and by the disposition of tickets acquired by him;

(B) In that the provisions of said Chapter 590 of the Laws of 1922, relative to the procurement of a license for carrying on the business of a ticket broker, are so interwoven with and dependent upon the provisions of said statute relating to the limitation of the amount which a ticket broker is permitted to charge for tickets as to be unconstitutional and void because it deprives the

owner of such tickets of his liberty and property without due process of law, and the entire statute is thereby rendered unconstitutional and void;

(C) In that Chapter 590 of the Laws of 1922, upon which the complaint herein is based, is unconstitutional and void in that it requires the payment of an excessive license fee;

(D) In that Chapter 590 of the Laws of 1922, upon which the complaint herein is based, is unconstitutional and void, in that it requires the procurement of a bond as a condition precedent for the issuance of a license to a ticket broker and permits such license to be revoked and such bond to be declared forfeited and to be enforced in the event that the ticket broker follows his lawfull occupation of earning a livelihood by selling tickets at a price in excess of that provided by the statute.

## POINTS.

### I.

**Chapter 590 of the Laws of 1922 is unconstitutional and void because it deprives the defendant of his liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.**

That the business of a ticket broker is a lawful one, that the pursuit of it cannot be prohibited, directly or indirectly, and that theatre tickets,

constitute property in the constitutional sense of the term, has been expressly adjudicated.

*People ex rel. Tyroler* vs. *Warden of the City Prison*, 157 N. Y., 116;
*People ex rel. Fleischmann* vs. *Caldwell*, 64 App. Div., 46; affd. 168 N. Y., 671;
*People* vs. *Marks*, 64 Misc. Rep., 679;
*Collister* vs. *Hayman*, 183 N. Y., 250;
*Matter of Newman*, 109 Misc. Rep., 622.

In the opinion rendered by Judge Lehman in the case now under review this is conceded. He says (237 N. Y., 320, 321):

> "The business of reselling tickets of admission to places of public amusement has always been regarded as a lawful business which serves the convenience and promotes the comfort of persons who desire to purchase at convenient times and places tickets which otherwise they could purchase only at the office established by the management of the places of amusement for the sale of tickets in advance of the performance until the full supply of tickets should be disposed of."

The central idea of this bill is to prohibit the owner of a ticket from selling it at a price which will be more than fifty cents in excess of the price stamped thereon by the owner of the theatre.

By Section 167 of the Statute it is announced that the price of or charge for admission to theatres, places of amusement or entertainments, is a matter affected with a public interest and subject to the supervision of the State, for the purpose of safeguarding the public against fraud, extortion, exorbitant rates, and similar abuses. The draftsman is evidently proceeding on the theory

that by means of a mere shibboleth or talismanic formula, that which is essentially a matter of private concern can be metamorphosed from its real character into one of public concern, despite the numerous decisions in which it has been adjudged to the contrary.

The Legislature has made no attempt to regulate the prices charged by middlemen or retailers in the sale of clothing, drugs or food products or to limit the price of labor, or of books. It is unreasonable to suggest that "the price of or charge for" theatre tickets is "affected with a public interest" when the Legislature regards the prices of the staples and necessaries of life, the wages of mechanics and laborers, the salaries of corporate officials and employees and the fees of doctors and lawyers as being unaffected by "public interest" or as being beyond the pale of its regulatory power.

Section 168 provides that no person, firm or corporation *shall resell*, or engage in the business of reselling any ticket of admission or any other evidence of the right of entry to a theatre, etc., without having first procured a license therefor from the Comptroller, paid an annual fee of $100 and given such information as the Comptroller may require, however inquisitorial.

Section 169 requires the applicant to file with his application a bond in the penal sum of $1,000 with two or more sureties, who shall be freeholders of the State of New York, *conditioned, among other things, that the obligor "will not exact or receive a price for any such ticket or evidence of the right of entry in excess of the price authorized by this article"* (referring to Sections 168 and 172). A suit to recover on the bond may be

brought by the Comptroller, or on the relation of any party aggrieved, and in the event that the obligor named in such bond has violated any of the conditions of such bond recovery for the full penal sum may be had in favor of the people of the State.

By Section 170 it is set forth that in the event that any licensee "shall charge for any ticket a price in excess of the price authorized by this article," necessarily referring to Section 172, the Comptroller is empowered to revoke the license on notice and an opportunity to answer the charge.

Section 171 requires every licensee, on request of the Comptroller, to supply such information as may be required concerning his business, business practices or business methods.

Section 172, which is the essential provision, with which all of the previous sections are by express reference, as above shown, intimately bound up and inextricably interwoven, declares:

> "No licensee shall resell any such ticket or other evidence of the right of entry to any theatre, place of amusement or entertainment, etc., *at a price in excess of fifty cents* in advance of the price printed on the face of such ticket or other evidence of the right of entry. Every person, firm or corporation who owns, operates or controls a theatre, etc., shall, if a price be charged for admission thereto, print on the face of each such ticket or other evidence of the right of entry, the price charged therefor by such person, firm or corporation."

Section 173 makes the violation of any provision of the article a misdemeanor.

We have already said that tickets are property. They are bought and sold. They have a market value. That the business of dealing in tickets is lawful has already been shown. Those engaged in

it pursue an occupation of great usefulness. They render a service to that part of the public desiring to attend the theatre or the opera on short notice, that would otherwise be likely to be disappointed in its efforts. They save their patrons the loss of time and the irritation resulting from the delay in being served at the box offices of the theatres to which they desire admission. Strangers who sojourn at the many hotels and who seek for innocent amusement would find it practically impossible at the height of the theatrical season to attend a performance of the character they desire but for these agencies, which are to be found in the principal hotels, or in communication with them. Residents of other cities are enabled, through these brokers, to arrange by telegraph or telephone for the purchase of tickets in anticipation of their coming to the city.

Some of these brokers have been engaged in this business for fifty years. In order to serve the public, they are obliged to rent expensive offices. Many of them have entered into leases for long terms. They employ assistants and bookkeepers and messengers. It is necessary for them to keep telephones and clerks to operate them so that they may be in communication with their patrons, with the theatres and with the public generally. What they charge is for their services. Each broker has his regular clientele, many of whom have running accounts with the broker, just as they would with any other kind of middleman through whom they may purchase merchandise or secure service of any kind.

By restricting these brokers in the price that they shall charge for their tickets (which constitute a marketable commodity) or for their serv-

ice (which is likewise a property right), by depriving them of their liberty of entering into contracts for the sale of such property or the rendition of the services which they are requested and able to render, the due process clause of the Constitution is effectually violated. There is nothing immoral or intrinsically wrong in the business which these men conduct.

That there is nothing inherently wrong in selling tickets or rendering service in connection with the procuring of tickets and making a charge of more than fifty cents in excess of the price marked on the tickets, clearly appears from recent Congressional legislation concerning the Internal Revenue.

By the Revenue Act of October 3, 1917 Sec. 700 (Fed. Stat. Ann. 1918 Supp., p. 354) a tax of one cent for each ten cents or fraction thereof of the amount paid for admission to any place of entertainment or amusement, was provided for.

By the Act of February 24, 1919 (40 Stat. L. 1057, Sec. 800; Fed. Stat. Ann. 1919 Supp., p. 158), it was provided that there was to be paid "upon tickets or cards of admission to theatres, operas and other places of amusement sold at news-stands, hotels and places other than the ticket offices of such theatres, operas or other places of amusement at not to exceed fifty cents in excess of the sum of the established price therefor at such ticket offices, plus the amount of any tax imposed under paragraph (1)", which is the normal tax payable by the theatre or other places of amusement under the Revenue Act of 1917 "a tax equivalent to five per centum of the amount of such excess; and if sold for more than fifty cents in excess of such established price plus the

amount of any tax imposed under paragraph (1), a tax equivalent to fifty per centum of the whole amount of such excess."

It was also provided in the same statute that "a tax equivalent to fifty per centum of the amount for which the proprietors, managers or employees of any opera house, theatre or other place of amusement sell or dispose of tickets or cards of admission in excess of the regular or established price or charge therefor" was to be paid.

The provisions last referred to were re-enacted in the Revenue Act of 1921 (Sec. 800 Fed. Stat. Ann. 1921 Supp., p. 191).

Neither in the act now under review, nor in any other statute of New York is there any limitation upon the amount that the proprietor, manager or employees of a theatre or other place of amusement may charge for tickets—even though § 172 requires those owning, operating or controlling a theatre to print on the face of the admission tickets issued, the price charged therefor, no obligation is imposed on those connected with the theatre to sell the tickets at the printed price.

Nobody is required to purchase admission tickets to the theatres who does not desire to do so. If the brokers buy tickets in order to supply their customers when there is no demand for them, they are themselves the losers. If the theatrical attraction proves to be unpopular, to the extent that they have in accordance with the requirements of the theatrical managers invested in tickets for such performance the loss falls upon them and not on the public. Their relation to the theatregoers is in no sense different from that of the haberdasher, the hatter, the dressmaker, the hotel keeper, the commission merchant, the jeweler, the

mechanic, the farmer, or the day laborer to those whom they respectively serve. It is no less an infraction of their right to liberty and property than it would be if the men belonging to any of these other categories were to be limited by statute or ordinance as to the price that they are to receive for the merchandise in which they deal or the service which they render. Such legislation savors of the ancient days when the tyrannical Statute of Laborers sought to fix in a rigid mould the compensation that those who labored on the farm and in the workshop were to receive, and of that species of legislation which limited the prices at which the products of the soil and of the industry of the artisan were permitted to be sold.

It will be interesting in this connection to refresh one's recollection regarding the Statutes of Laborers enacted 23 and 25, Edward III (1349 and 1350), and the enactments of 5 Elizabeth, c. 4, as to the compensation of handicraftsmen, servants and artificers, and the prices at which farm produce and other merchandise might be sold. They are collated in Chapter I of the monograph by the late Albert Stickney, a promiment member of the New York bar, entitled "*State Control of Trade and Commerce*" (printed in 1897).

Like the present act these statutes also began with recitals; the first of them proclaimed:

"Because a great part of the people and especially of workmen and servants late died of the pestilence, many seeing the necessity of masters and great scarcity of servants will not serve unless they receive excessive wages * * * we, considering the grievous incommodities, which the lack especially of ploughmen and such laborers

may hereafter cause, have * * * ordained: (*p. 10*).

The second (*pp. 15, 16*) referring to the enactment of 1349 as being aimed "against the *malice* of servants * * * not willing to serve after the pestilence without taking excessive wages" declared that it had been ordained "that such manner of servants, as well men as women should be bound to serve receiving salary and wages accustomed in places where they ought to serve in the twentieth year of the reign of the King that now is, or five or six years before * * * and now for as much as * * * the said servants having no regard to the said ordinance, but to their ease and singular *covetise*, do withdraw themselves to serve great men and other, unless they have livery and wages to the double or treble of that they were wont to take the said twentieth year and before, to the great damage of the great men and impoverishing all of the said commonalty * * * wherefore * * * to refrain the *malice* of the said servants * * * be ordained:

Not only were the acts of the laborers inveighed against, characterized as covetise and malice, but also as "coactions and manifest extortions" (*p. 13*).

In 1564, Parliament (5 Eliz. c. 4) still continued to make recitals of the same character, with the interpolated concession "that the wages and allowances limited and rated in many of said statutes are in divers places too small and not answerable to this time, respecting the advancement of prices of all things belonging to the said servants and laborers" but still persisted in the tyrannical policy adopted two hundred and twelve years previously. The terms of this statute are instructive (*pp. 24 to 35*).

The very thought makes one shudder that it was declared by statute that a haymaker was to receive but a penny a day, the mower of meadows but five pence for the acre, and the reaper of corn in the first week of August two pence and thereafter three pence, without meat or drink, (*p. 16*) that none should take for threshing a quarter of wheat or rye over two pence and for the quarter of barley, beans, peas and oats one penny (*p. 17*), that a master carpenter was limited to three pence, a master mason to four pence, and a plasterer to the like amount, without meat or drink, (*p. 17*) that cordwainers and shoemakers shall not sell boots or shoes in any other manner than in the twentieth year of the reign of Edward (*p. 18*) and that because of the dearth of poultry the price of a young capon should not pass three pence, of a hen two pence, of a pullet one penny, and of a goose four pence (*p. 20*). The infraction of personal liberty becomes the more significant when it is considered that it was declared that "every person able in body under the age of sixty years, not having to live on, being required, shall be bound to serve him that doth require him or else committed to the gaol until he find surety to serve," (*p. 10*) and that a violation of these provisions was made punishable with imprisonment (*pp. 11, 18, 19*). So comprehensive was this legislative scheme that it was enacted (*p. 11*) "that no man pay, or promise to pay any servant any more wages, liveries, meal or salary than was wont as afore is said."

Can it be seriously contemplated that, in spite of the constitutional guaranties to secure the liberty of the citizen, we are to restore a system of so nefarious a character as that which prevailed in the evil days when such legislation as that described was enacted and attempted to be enforced?

In the act now under consideration the right of the ticket brokers to carry on their business and to sell their property and their services in the manner indicated, is sought to be curtailed by the mere fiat of the Legislature. The unsoundness of this procedure from the constitutional standpoint is capable of easy illustration. Let us suppose that, instead of relating to theatre tickets, this statute had aimed its shafts at jewelers. Would it be within the purview of the legislative power to say that a licensed jeweler shall not charge more than $1 in excess of the cost to him of a ring supplied to him by a manufacturer, or that he shall sell his diamonds in accordance with a schedule of prices established by the Legislature based upon the charges of the diamond cutters at Amsterdam and London, or of the miner at Kimberly? Again, let us suppose that a licensed vendor of rugs were limited to making sales at a fixed percentage over their cost at Bagdad or in Bokhara, or that a licensed dealer in oil paintings were prohibited from disposing of them at a price exceeding to the extent of $100 that paid to the artist; or, for that matter, that the licensed artist himself were forbidden to sell at a sum exceeding the cost of the canvas, paint, frame, and five dollars a day for the time spent in the production of his artistic creation. Could such legislation be upheld? The purchase of luxuries has been instanced because of the similarity between them and tickets of admission to the theatre or the opera.

On the theory of this legislation it would be equally permissible to limit the compensation of lawyers and physicians, of journalists and accountants, of clerks and bookkeepers, the wages of shoemakers and tailors, of carpenters and bricklayers, the commissions of factors and brok-

ers and of agents of every imaginable variety. It would likewise enable the Legislature to fix the prices of food and clothing, of books and magazines, of stone and lumber, of iron beams and copper sheathing, of aeroplanes and automobiles, the profit of the newsboy, of the fruit-vendor, of the barber and the bootblack. Illustrations might be multiplied by the thousands including every branch of industry, agriculture, commerce, or other human activity. In fact the power of the legislature would be supreme and everybody, practically, would be placed in a straight-jacket.

The whole theory of such legislation is vicious and dangerous, and the precedent that would be created by sustaining the act now under consideration would be an invasion of liberty, calculated to work lasting injury not only to the individual but to the public welfare.

The limitations on the power of the Legislature to fix the price of commodities or of services, or to limit the right to contract with regard to them were stated with his accustomed clarity by Judge Andrews, in *People* vs. *Budd*, 117 N. Y., 15, affd. *sub. nom. Budd* vs. *New York*, 143 U. S., 517:

> *"In determining whether the Legislature can lawfully regulate and fix the charge for elevating grain by private elevators, it must be conceded that the uses to which a man may devote his property, the price which he may charge for such use, how much he shall demand or receive for his labor, and the methods of conducting his business are, as a general rule, not the subject of legislative regulation. These are a part of our liberty, of which, under the constitutional guaranty, we cannot be deprived. We have no hesitation in declaring that unless there are special conditions and circumstances which bring the business of elevating grain within principles*

*which, by the common law, and the practice of free governments justify legislative control and regulation in the particular case, the Statute of 1888 cannot be sustained. That no general power resides in the Legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the price of commodities or services, or interfere with freedom of contract, we cannot doubt. The merchant and manufacturer, the artisan and laborer, under our system of government, are left to pursue and provide for their own interests in their own way, untrammeled by burdensome and restrictive regulations which, however common in rude and irregular times, are inconsistent with constitutional liberty."*

This language was quoted with approval in the opinion of Judge Lehman in the present case (237 N. Y. 322).

## The Minimum Wage Case.

The most recent authoritative decision on this proposition which though called to the attention of the Courts below, was not even dignified with notice, is *Adkins* vs. *Children's Hospital*, 261 U. S., 525.

It involved the constitutionality of an Act of Congress which provided for the fixing of minimum wages for women and children in the District of Columbia. A board was constituted representative of employers, employees and the public. Among its duties was that of ascertaining and declaring standards of minimum wages for women in any occupation within the District of Columbia, "and what wages are inadequate to supply the necessary cost of living to any such women workers to maintain them in good health

and to protect their morals." The Act was declared unconstitutional on the ground that the right to contract concerning one's affairs, including that of making contracts of employment and to obtain the best terms one can as the result of private bargaining, is a part of the "liberty" of the individual protected by the Constitution; that this Act arbitrarily interfered with the freedom of contract, and that even though it had been decided in prior cases that, in respect to labor legislation, special consideration was to be given to the physical qualifications of women, those considerations did not apply to legislation which constituted a statutory determination as to the wages to be paid to women for their services.

Speaking for the majority of the Court, Mr. Justice Sutherland made the following comments (pages 554, 558, 560), which are fully as applicable here as they were to the statute to which they were directed:

> "It is simply and exclusively a price-fixing law, confined to adult women (for we are not now considering the provisions relating to minors), who are legally as capable of protecting themselves as men. *It forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect to the price for which one shall render service to the other in a purely private employment where both are willing, perhaps, anxious, to agree,* even though the consequence may be to pledge one to surrender a desirable engagement and the other to dispense with the services of a desirable employee. * * * *In principle there can be no difference between the case of selling labor and the case of selling goods.* If one goes to the butcher, the baker or grocer to buy foods, he is morally entitled to obtain

the worth of his money, but he is not entitled to more. If what he gets is worth what he pays he is not justified in demanding more simply because he needs more, and the shopkeeper having dealt honestly and fairly in that transaction is not concerned in any peculiar sense with the question of his customer's necessities. Should a statute undertake to vest in a commission power to determine the quantity of food necessary for individual support and require the shopkeeper, if he sells to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. * * *

"*Finally, it may be said that if, in the interest of the public welfare, the police power may be invoked to justify the fixing of a minimum wage, it may, when the public welfare is thought to require it, be invoked to justify a maximum wage. The power to fix high wages connotes by like course of reasoning the power to fix low wages.* If in the face of the guaranties of the Fifth Amendment, this form of legislation shall be legally justified, the field for the operation of the police power will have been widened to a great and dangerous degree. *If, for example, in the opinion of future law makers, wages in the building trades shall become so high as to preclude people of ordinary means from building and owning homes, an authority which sustains a minimum wage will be invoked to support a maximum wage for building laborers and artisans, and the same argument which has been here urged to strip the employee of his constitutional liberty of contract in one direction will be utilized to strip the employer of his constitutional liberty of contract in the opposite direction. A wrong decision does not end with itself; it is a precedent, and with the swing of sentiment its bad influence may run from one extremity of the arc to the other.*"

Among the cases cited in support of the conclusion reached by the Court were *Adair* vs. *United States*, 208 U. S., 174, 175, and *Coppage* vs. *United States*, 236 U. S., 14. The language of Mr. Justice Harlan in the first of these cases was quoted by Mr. Justice Sutherland at page 545, as follows:

> "The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell. * * * In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

Mr. Justice Sutherland then quoted from the opinion of Mr. Justice Pitney in the second of these cases (pages 545, 546) as follows:

> "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority have no other honest way to begin to acquire property, save by working for money."

The constitutionality of the act was ineffectually sought to be sustained by the decisions in *Wilson* vs. *New*, 243 U. S., 322; *Block* vs. *Hirsh*, 256 U. S., 135, and *Marcus Brown Holding Co.* vs. *Feldman*, 256 U. S., 170; and *Levy Leasing Co.* vs. *Siegel*, 258 U. S., 242. These cases were distinguished by Mr. Justice Sutherland (pages 551, 552) on the ground that the legislation there attacked was temporary in its operation and was passed to meet a sudden and great emergency because the parties affected for the time being *could or would not agree;* while in the case under consideration, as well as in the present case, *the parties were forbidden to agree.*

The Court then referred to the decision in *Pennsylvania Coal Co.* vs. *Mahon*, 260 U. S., 393, 416, where Mr. Justice Holmes, after saying:

> *"We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change"*

added:

> *"The late decisions upon laws dealing with the congestion of Washington and New York; caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They went to the verge of the law, but fell far short of the present act."*

See also:

> *Fisher Co.* vs. *Woods*, 187 N. Y., 90;
> *People ex rel. Moscowitz* vs. *Jenkins*, 202 N. Y., 53;

*People* vs. *Ringe*, 197 N. Y., 143;
*Hauser* vs. *North British & Merc. Ins. Co.*, 206 N. Y., 455;
*People ex rel. Niger* vs. *Van Dell*, 85 Misc. Rep., 92.

In *Adams* vs. *Tanner*, 244 U. S., 590, an act which forbade employment agents from receiving fees from workers for whom they found places, was held to violate the due process clause of the Fourteenth Amendment, because it in effect destroyed their occupation as agents for workers, the business of securing such work for the unemployed in return for an agreed consideration being regarded as a useful and legitimate business. In the course of his opinion Mr. Justice McReynolds said:

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in and upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked. The general principles by which the validity of the challenged measure must be determined have been expressed many times in our former opinions. It will suffice to quote a few.

> In *Allgeyer* vs. *Louisiana*, 165 U. S., 578, 589, we held invalid a statute of Louisiana which undertook to prevent a citizen from contracting outside the State for insurance on his property lying therein because it violated the liberty guaranteed to him by the Fourteenth Amendment. The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and esesntial to his carrying out to a successful conclusion the purposes above mentioned."

The following quotations from other decisions are pertinent:

> "The right to buy, sell, barter and exchange property is a necessary incident to its ownership, and, subject to reasonable regulations, is as much protected by this provision of the Constitution as is the ownership itself."
>
> *City of Carrollton* vs. *Bazzette*, 159 Ill., 283; cited with approval in
>
> *People ex rel. Moskowitz* vs. *Jenkins*, 202 N. Y., 53.

> "Every one has the right to adopt such means to sell his goods and conduct his business as he finds most profitable to him, provided those means are honest, and the fact that some persons engaged in the same business are dishonest does not justify legislation

prohibiting either directly or indirectly the business."

*People ex rel. Moskowitz* vs. *Jenkins, supra;*
*People ex rel. Tyroler* vs. *Warden,* 157 N. Y., 116.

"Restraint by statute and restraint by contract are quite different. What the parties to a contract agree upon is valid almost without limitation, but what the Legislature may prohibit parties from agreeing upon is subject to the limitation of the fundamental law."

*Collister* vs. *Hayman,* 183 N. Y., 250.

In *Fisher Co.* vs. *Woods,* 187 N. Y. 90, a section of the Penal Code which provided that in cities of a certain class persons offering for sale real property without the written authority of the owner were guilty of a misdemeanor, was declared unconstitutional. In the course of his opinion Judge Haight said:

"The business of a real estate agent or broker or of any person who engages his services to an owner of real estate to hunt up or procure a purchaser, through advertisements or otherwise, is perfectly lawful and legitimate, and persons engaged in that business are entitled to as full a protection of their rights under the Constitution as that of any other person engaged in any of the other professions, trades or occupations. It may be that there are dishonest persons engaged in the business of real estate agents, but it is equally true that dishonest persons are found in every occupation."

In *Producers Transportation Co.* vs. *Railroad Commissioners,* 251 U. S., 230 which related to the

operation of a pipe-line for the transportation of oil, Mr. Justice Van Devanter said:

> "It is of course true that if the pipe line was constructed to carry oil for particular producers under strictly private contacts and never was devoted by its owner to public use, that is, to carrying for the public, the State could not, by mere legislative fiat or by any regulating commission, convert it into a public utility or make its owner a common carrier, for that would be taking private property for public use without just compensation which no State can do consistently with the due process clause of the Fourteenth Amendment."

In *Michigan Public Utilities Commission* vs. *Duke*, 45 Sup. Ct. Rep. 191, decided January 12, 1925, it was held that an act making persons engaged in transportation of persons or property by motor vehicle on public highways, common carriers violated the due process clause as applied to a private carrier engaged exclusively in transporting property for certain concerns, under contracts with them. Mr. Justice Butler said:

> "Moreover, it is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no state can do consistently with the due process clause of the Fourteenth Amendment. Producers Transportation Company *vs.* Railroad Commission, 251 U. S. 228, 230, Wolff Co. *vs.* Industrial Commission, 262 U. S. 522, 535."

**Decisions Relating to Prices of Theatre Tickets.**

It is unnecessary, however, to discuss at length the philosophy of legislation of this character, since carefully adjudicated cases have denied the existence of the power of the legislature to fix the price of theatre tickets.

*People* vs. *Newman,* 109 Misc., 622;
*Ex parte Quarg,* 149 Cal., 79, 5 L. R. A., N. S., 183;
*People* vs. *Steele,* 231 Ill., 340, 14 L. R. A., N. S., 361;
*City of Chicago* vs. *Powers,* 231 Ill., 531, 83 N. E. Rep., 240;
*People* vs. *Weiner,* 271 Ill., 74; L. R. A., 1916, C. 775;
*Chicago* vs. *Netcher,* 183 Ill., 104; 48 L. R. A., 261.

In *People* vs. *Newman* (*supra*), the reasoning of which, as has been shown, was approved and referred to by Governor Miller in 1921 as being "*so cogent as to permit no other conclusion,*" Justice Rosalsky declared unconstitutional Section 11-a, Article I, Chapter 3 of the Code of Ordinances of the City of New York, which prohibited the re-sale of theatre tickets at a price greater than fifty cents in excess of the sum printed thereon and which permitted the revocation of a license to sell tickets in the event of a re-sale in excess of that sum. The comprehensive opinion evinces so exhaustive and painstaking a study of the subject that it is earnestly commended for consideration. It is believed that it will be found helpful.

In *Ex parte Quarg, supra,* Mr. Justice Shaw said:

"It is perhaps, not important in this case to consider and define the precise nature of a theatre ticket. It may be either a mere license, revocable at the will of the proprietor of the theatre, or it may be evidence of a contract whereby, for a valuable consideration, the purchaser has acquired the right to enter the theatre and observe the performance, on condition that he behaves properly. These are matters which concern only the proprietor and the purchaser. No third person can question the right of the purchaser. However, by the act of 1893 (Stat. 1893, Chap. 185, page 220), a ticket of admission to a public place of amusement, when sold, is made, at least, an irrevocable license to the purchaser of the ticket to occupy a place therein during the performance. Greenberg *vs.* Western Turf Assn., 140 Cal., 360, 73 Pac., 1050. Such a ticket, therefore, represents a right, positive, or conditional, as the case may be, according to the terms of the original contract of sale. This right is clearly a right of property. The ticket which represents that right is also, necessarily, a species of property. As such, the owner thereof, in the absence of any condition to the contrary in the contract by which he obtained it, has the clear right to dispose of it, to sell it to whom he pleases and at such price as he can obtain. The statute in question forbids any sale for a price higher than that at which it was sold by the proprietor of the theatre; and to that extent it infringes upon the right of property guaranteed by the Constitution and existing in the individual. It is therefore a void enactment, unless it can be upheld as an exercise of the police power.

"The police power is broad in its scope, but it is subject to the just limitation that it extends only to such measures as are reasonable in their application, and which tend in some

appreciable degree to promote, protect, or preserve the public health, morals or safety, or the general welfare. The prohibition of an act which the Court can clearly see has no tendency to affect, injure, or endanger the public in any of these particulars, and which is entirely innocent in character, is an act beyond the pale of this limitation; and it is therefore not a legitimate exercise of police power. The sale of a theatre ticket at an advance upon the original purchase price, or the business of reselling such tickets at a profit, is no more immoral, or injurious to public welfare or convenience, than is the sale of an ordinary article of merchandise at a profit. It does not injure the proprietor of the theatre; he must necessarily have parted with the ticket at his own price and upon his own terms before such resale can be made. It does not injure the second buyer; he must have had the same opportunity as the first buyer to purchase a similar ticket, and no greater right thereto; and, having neglected that opportunity, or being unwilling to undergo the necessary inconvenience, and willing to pay a higher price rather than forego the privilege which the other by his greater diligence and effort has obtained, the transaction is just as fair as he is concerned."

In *People* vs. *Steele, supra,* Mr. Justice Dunn said:

"The statute prohibits the sale of a theatre ticket at a price above the printed rate, and prohibits the establishing of an agency for such sale. There is nothing immoral in the sale of theatre tickets at an advance over the price at the box office. Such sale is not injurious to the public welfare, and does not affect the public health, morals, safety, comfort or good order. It does not injure the buyer or the proprietor of the theatre. The buyer purchases voluntarily. He is under no

compulsion. If the conducting of a theatre is a mere private business, there is no reason why the proprietor may not sell the tickets when and where, at what prices, and on what terms, he chooses. It is insisted, however, that the operation of a theatre is a business affected with a public interest, and therefore is subject to control by the legislature. It is a well-established doctrine that, where the owner of property has devoted it to a use in which the public has an interest, he, in effect, grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public for the common good, so long as such use is maintained. * * * The fact that a license is required does not make the business a public employment. The cases where a business has been regarded as affected with a public interest have been cases where the person or corporation engaged in the business was acting under a franchise, or cases affecting trade and commerce, where either there has been a virtual monopoly of means of transportaitnon or methods of commerce; or, where, from the nature of the business, in its regular course, the person carrying it on was necessarily entrusted with the property or money of his customers; * * *

"The act prohibits the sale of a ticket by the manager of a theatre without the requirement on its face that it shall not be resold at an advance. It prohibits the sale of a ticket at an advance, and it prohibits the keeping of a place for such sale. If the manager finds it profitable to have tickets on sale at different places, he may not sell at the regular price to brokers who maintain offices at such places and get their expenses and profits out of the advance in price on their resale of the tickets. The broker's business is prohibited, because it has been made unlawful to make a profit. The public is no better nor worse off in health,

morals, security, or welfare. These are arbitrary and unreasonable interferences with the rights of the individuals concerned. The business of the broker in theatre tickets is no more immoral or injurious to the public welfare than that of the broker in grain or provisions. If he does not make the price satisfactory to intending purchasers, they are under no compulsion to buy. They have no right to buy at any price except that fixed by the holder of the ticket. The manager may fix the price arbitrarily, and may raise or lower it at his will. Having advertised a performance, he is not bound to give it, and having advertised a price, he is not bound to sell tickets at that price. It is immaterial to determine whether a theatre ticket is either transferable or revocable. The fact is that the bearer of the tickets is admitted to the performance. The business of dealing in theatre tickets is carried on to some extent, at least, and the right to do so and to contract in regard to such rights is a right in which those who use it are entitled to be protected."

## II.

**The business of conducting a theatre and consequently of selling or procuring tickets of admission is not affected by a public interest, in the sense that the Legislature may fix the price at which such tickets may be sold by brokers or limit the compensation chargeable by brokers for procuring them.**

This general subject was luminously treated by Mr. Chief Justice Taft, speaking for a unanimous Court in *Charles Wolff Packing Co.* vs. *Court of*

*Industrial Relations,* 262 U. S., 522. That case involved the validity of a statute creating a court invested with the power to summon the parties and hear any dispute over wages or other terms of employment in any of the designated industries, and which provided that if it should find the business and health of the public imperiled by such *controversy, to make findings and fix the wages* and other terms for the future conduct of the industry. In that case the Packing Company was engaged in slaughtering hogs and cattle and preparing the meat for sale and shipment. *A controversy arose respecting the wages which it was paying to its employees. The Court made findings, including one that an emergency existed, and an order as to wages was made increasing them over the figures to which the company had shortly before reduced them. The statute declared various industries, among others, 1, the manufacture and preparation of food for human consumption; 2, the manufacture of clothing for human wear, and 3, the production of any substance in common use for fuel, each of them infinitely more vital than the purveying of amusement, "to be affected with a public interest."* It was nevertheless held, that the act was unconstitutional because it deprived both employer and employee of liberty without due process of law.

The case is especially important because of the commentary to be found in the opinion of Chief Justice Taft, on the formula that a business is "affected by a public interest." He first classifies, page 535, the businesses as to which it has been said that they are clothed with a public interest justifying some public regulation, as follows: (1) those carried on under the authority of a pub-

lic grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any part of the public, such as railroads, other common carriers and public utilities; (2) certain occupations, regarded as exceptional, as, for example, the keepers of inns, cabs and grist mills, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial Legislatures for regulating all trades and callings; and (3) businesses which though not public at their inception may be fairly said to have risen to be such and to have become subject in consequence to some governmental regulation. The opinion then continues (pages 536, 537, 538, 539, 540, 543, 544):

> "It is manifest from an examination of the cases cited under the third head *that the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified.* The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry.
>
> "In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well-being of the people. The public may suffer from high prices or strikes in many trades, *but the expression 'clothed with a public interest,' as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered.* The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn* vs. *Illinois* and

the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public. * * *

"*It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. It is true that in the days of the early common law an omnipotent parliament did regulate prices and wages as it chose, and occasionally a colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances.* * *

"In nearly all the business included under the third head above, the thing which gave the public interest *was the indispensable nature of the service* and the exorbitant charges and arbitrary control to which the public might be subjected without regulation. * * *

"To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over

its entire management and run it at the expense of the owner. * * *

"If, as, in effect, contended by counsel for the State, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be running the public interest argument into the ground, to use a phrase of Mr. Justice Bradley in characterizing a similarly extreme contention. *Civil Rights Cases*, 109 U. S., 3, 24. It will be impossible to reconcile such result with the freedom of contract and of labor secured by the Fourteenth Amendment.

"This brings us to the nature and purpose of the regulation under the Industrial Court Act. The avowed object is continuity of food, clothing and fuel supply. * * * The employer is bound by this act to pay the wages fixed *and while the worker is not required to work, at the wages fixed*, he is forbidden, on penalty of fine or imprisonment, to strike against them and thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him. * * *

"The minutely detailed government supervision, including that of their relations to their employees, to which the railroads of the country have been gradually subjected by Congress through its power over interstate commerce, furnishes no precedent for the regulation of the business of the plaintiff in error whose classification as public is at the best doubtful. It is not too much to say that the ruling in *Wilson* vs. *New*, went to the border line although it concerned an interstate common carrier in the presence of a nation-wide emergency and the possibility of great disaster. Certainly there is nothing to justify

extending the drastic regulation sustained in that exceptional case to the one before us.

"We think the Industrial Court Act in so far as it permits the fixing of wages in plaintiff in error's packing house is in conflict with the Fourteenth Amendment and deprives it of its property and liberty of contract without due process of law."

This decision was followed in *Dorchy* vs. *Kansas*, 264 U. S. 286, 289, where the business involved and declared to be affected with a public interest, was the mining of coal.

## Authorities Relied Upon by the State.

Our opponents driven to the proposition that the business conducted by ticket-brokers is affected by a public interest, rely upon a line of decisions some of which are considered in the opinion just cited and none of which have anything in common with the present case.

They all relate to a business which involved an admittedly public interest, as, for example, the business of a common carrier, an inn-keeper, or a similar or equivalent occupation, especially that of a public service corporation or one whose right to carry on business depends entirely upon legislative authority.

Such was *Munn* vs. *Illinois*, 94 U. S., 113. It related to the regulation of elevators for the storage of grain, a business having, for all practical purposes, the characteristics of that of a common carrier, and therefore, affected with a public interest. As was said by Mr. Justice Waite:

"Property does become clothed with a public interest when used in a manner to make

> it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use."

It was there shown that the business of the warehousemen, who were carrying on their operations in Chicago and to whom this statute related, was so conducted that every bushel of grain that came into the city paid a toll for its passage, which was a common charge. The elevators stood in the very gateway of commerce and took toll from all who passed. The entire public therefore had a direct and positive interest in the business which in every aspect of it was indispensable to the public welfare.

In the present case there is no such element as that considered in the grain elevator case just referred to. Ticket brokers are engaged in a private business. Nobody is called upon to deal with them who does not desire to do so. They may refuse to serve the public generally. They may at will suspend their business. They have no interest in the theatres to which the tickets confer admission. They lawfully acquire the tickets which they sell to or which they procure for their customers. Their business is no more public than that of any other kind of broker or agent or of any merchant.

*German Alliance Ins. Co.* vs. *Kansas*, 233 U. S., 389, is similar to *Munn* vs. *Illinois*. There, the business sought to be regulated was that of fire insurance. That was shown to be a business that had been regulated for many years in all parts of the country. In fact it cannot be carried on at all, without legislative authority. It was conceded to be one affecting the public welfare. Insurance was

looked upon as being an assimilation to a tax. A large part of the country's wealth subject to uncertainty of loss through fire was recognized as being protected by insurance. This was regarded as a demonstration of the interest of the public in the business. Mr. Justice McKenna, after referring to these features of the business, said:

> "To the contention that the business is private, we have opposed the conception of the public interest. We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositaries of the money of the insured, possessing great power thereby and charged with great responsibility. How necessary their solvency is, is manifest. On the other hand to the insured, insurance is an asset, a basis of credit. It is practically a necessity to business activity and enterprise. It is, therefore, essentially different from ordinary commercial transactions, and, as we have seen, according to the sense of the world from the earliest times—certainly the sense of the modern world—is of the greatest public concern. It is, therefore, within the principle we have announced. * * * The principle we apply is definite and old and has, as we have pointed out, illustrating examples. And both by the expression of the principle and the citation of the examples *we have tried to confine our decision to the regulation of the business of*

*insurance, it having become 'clothed with a public interest, and therefore subject to be controlled by the public for the common good.'"*

Attention is also called to the dissenting opinion of Mr. Justice Lamar, in which the Chief Justice and Mr. Justice Van Devanter concurred, as indicating the limitations on the power to fix prices, which were recognized, although deemed inapplicable by the majority of the Court to the subject of insurance for the reasons above quoted.

It has been argued that this case is similar to *Block* vs. *Hirsh*, 256 U. S., 135, 154; *Marcus Brown Holding Co.* vs. *Feldman*, 256 U. S., 170; *Edgar A. Levy Leasing Co.* vs. *Siegel*, 258 U. S., 242, and *People ex rel. Durham Realty Co.* vs. *LaFetra*, 230 N. Y., 429. These cases proceed upon an entirely different principle, namely, that an emergency existed which made it necessary for the state to interfere temporarily, and not permanently, in the interest of public health. It was contended that there was a dearth of housing facilities, which, in the absence of legislative protection to those in the occupation of dwellings, would subject thousands of families to exposure in inclement weather, deprive them of a roof over their heads, and thus endanger the health and lives of a considerable part of the community. This legislation was considered exceptional, and great care was taken to make it clear that it should not be regarded as a precedent in normal times.

This is shown by the opinion of Mr. Justice Holmes in *Pennsylvania Coal Co.* vs. *Mahon*, 260 U. S., 293, 416, where the same voice that spoke for the majority in the Rent Cases, just referred to,

rendering a judgment from which there was but one dissent, declared:

> "The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a *temporary emergency* and providing for compensation determined to be reasonable by an impartial board. *They went to the verge of the law*, but fell far short of the present act."

See also

*Adkins* vs. *Children's Hospital* (*supra*).

In *Terminal Taxicab Co.* vs. *District of Columbia*, 241 U. S., 252, 256, the case likewise involved the regulation of a taxicab business which provided service at railroad stations and hotels. It was held that, in so far as the business which was sought to be regulated by the Public Utilities Commission of the District of Columbia related to the public use of the plaintiff's taxicabs, the regulation thereof was lawful; but as to that portion of its business which consisted mainly in furnishing automobiles from its central garage on orders by telephone, it was held that the regulation was not authorized. Mr. Justice Holmes thus expressed the views of the Court:

> "Although I have not been able to free my mind from doubt, the Court is of opinion that this part of the business is not to be regarded as a public utility. It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. But however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the

public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shop keeper may refuse his wares arbitrarily to a customer whom he dislikes, and although that consideration is not conclusive, *German Alliance Ins. Co.* vs. *Kansas*, 233 U. S., 389, 407, it is assumed that such a calling is not public as the word is used. In the absence of clear language to the contrary, it would be assumed that an ordinary livery stable stood on the same footing as a common shop, and there seems to be no difference between the plaintiff's service from its garage and that of a livery stable."

In *Yellow Taxicab Co.* vs. *Gaynor*, 82 Misc. Rep., 94, affd., 159 App. Div., 893, 212 N. Y., 97, the ordinance involved related to the regulation of taxicabs. The Charter gave express power to the Board of Aldermen to provide for the licensing and otherwise regulating the business of hackmen and cabmen, including the regulation of the rates of fares. The business was unquestionably that of a common carrier, and consequently was subject to the same power of regulation as that of a railroad or a ferry, and has been so regarded from time immemorial.

*Schmidinger* vs. *Chicago*, 226 U. S., 578, merely involved the question as to whether an ordinance, enacted under express legislative authority, fixing standard size of bread loaves, was valid. That was regarded merely as an exercise of the police power intended to prevent deceit, and practically of the same character as that of fixing weights and measures. It did not undertake to go beyond that point.

This decision was modified in *Burns Baking Co.* vs. *Bryan*, 264 U. S., 505.

*Rast* vs. *Van Deman & Lewis*, 240 U. S., 342, which related to a special tax on trading stamps, proceeded on the theory set forth by Mr. Justice McKenna at page 365 and which has no application here:

> "The schemes of complainants have no such directness and effect. They rely upon something else than the article sold. They tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence. This may not be called in an exact sense a 'lottery,' may not be called 'gaming'; it may, however, be considered as having the seduction and evil of such, and whether it has may be a matter of inquiry and of judgment that it is finally within the power of the Legislature to make."

In *People ex rel. Armstrong* vs. *Warden*, 183 N. Y., 226, the validity of certain provisions of the employment agency act was considered. It was held that in order to prevent frauds and to suppress immorality it was lawful for the legislature to regulate the keeping of employment agencies. The license fee imposed by the statute was the sum of $25 annually in cities of the first and second class, to which alone the act related. The legislation clearly came within the police power of the State. Judge O'Brien said:

> "The Legislature had the right to take notice of the fact that such agencies are places where emigrants and ignorant people frequently resort to obtain employment and to procure information. The relations of a person so consulting an agency of this character with the managers or persons conducting

> it are such as to afford great opportunities for fraud and oppression, and the statute in question was for the purpose of preventing such frauds and, probably, for the suppression of immorality."

The limitation of the power of the Legislature to regulate the compensation of employment agencies was as has been shown, fully considered in *Adams* vs. *Tanner*, (*supra*).

That even a theatre, and *a fortiori*, those who are engaged in the business of selling tickets entirely outside of the theatre, do not come within the purview of the doctrine on which the State relies, is apparent from the decisions in *Collister* vs. *Hayman*, 183 N. Y., 250; *People ex rel. Burnham* vs. *Flynn*, 189 N. Y., 160; *Aaron* vs. *Ward*, 203 N. Y., 355, and *Woolcott* vs. *Shubert*, 217 N. Y., 212.

In *Collister* vs. *Hayman* (*supra*), the question arose as to whether the owner of a theatre on issuing tickets could condition their validity by providing that if sold by the purchaser on the sidewalk they would be refused at the door. It was contended that this condition was opposed to public policy and that the theatre owner had no right to make it a part of his contract with purchasers. This contention was rejected. In the course of his opinion Judge Vann said:

> "The defendants were conducting *a private business* which, even if clothed with a public interest, *was without a franchise to accommodate the public, and they had the right to control it the same as the proprietors of any other business*, subject to such obligations as were placed upon them by the statute hereinafter mentioned. Unlike a carrier of passengers, for instance, with a franchise from the State and

hence under obligation to transport any one who applies and to continue the business year in and year out, the proprietors of a theatre can open and close their place at will and no one can make lawful complaint. *They can charge what they choose for admission to their theatre. They can limit the number admitted. Then can refuse to sell tickets and collect the price of admission at the door.* They can preserve order and enforce quiet while the performance is going on. They can make it a part of the contract and a condition of admission, by giving due notice and printing the condition in the ticket, that no one shall be admitted under twenty-one years of age, or that men only or women only shall be admitted; or that a woman cannot enter unless she is accompanied by a male escort, and the like. *The proprietors in the control of their business may regulate the terms of admission in any reasonable way. If these terms are not satisfactory no one is obliged to buy a ticket or make the contract.*"

Further on in the opinion, Judge Vann says:

"*This is not a case involving the liberty of the plaintiff to sell his property, for he could sell it to any person and in any place, except in the one prohibited by the contract which constituted the property.* The contract did not interfere with his absolute freedom of action except to this limited extent duly agreed upon in advance, while he attempts to interfere with freedom of contract on the part of the defendants by restraining them from enforcing an agreement which they had made and to which he had assented. *Restraint by statute and restraint by contract are quite different. What the parties to a contract agree upon is valid almost without limitation, but what the Legislature may prohibit parties from agreeing upon is subject to the limita-*

> *tions of the fundamental law.* * * * This case involves not a statute but a contract, which excludes no one from carrying on the business of selling theatre tickets, but simply prevents a sale thereof on the sidewalk in violation of the express stipulation of the tickets themselves."

*People* vs. *King,* 110 N. Y., 418, also relied upon by the state, was cited and distinguished, the Court saying:

> "This has no bearing upon the resale of tickets in violation of a contract made with the original purchaser. It was especially designed to prevent the exclusion from 'places of public accommodation or amusement,' of anyone on account of race, creed or color, and apparently was also intended to prevent any discrimination founded on rank, grade, class or occupation. The contract and tickets in question did not discriminate against any person on account of any reason named in the statute, for the same condition is imposed upon all and all are treated alike."

In *Burnham* vs. *Flynn, supra,* the relator, a theatrical manager, was committed on a warrant charging him with conspiracy to exclude from the theatres of New York City one Metcalf, a dramatic critic, because of malicious, scurrilous and unjustifiable attacks upon the Jewish patrons of the theatres, which tended to injure the business of the theatres. In the course of the opinion, which held that no crime had been committed, Judge Edward T. Bartlett said:

> "The remaining question in the case is whether the proprietor of a theatre has a right to decide who shall be admitted to witness the plays he sees fit to produce in the absence of

any express statute controlling his action. At this late day the question cannot be considered as open in this State. There are a number of cases arising out of the purchase of theatre tickets from speculators on the sidewalk after notification by the proprietor that the same will not be honored at the door. * * * These cases illustrate the absolute control that the proprietor of a theatre exercises over the house and the audience. *He derives from the State no authority to carry on his business, and may conduct the same precisely as any other private citizen may transact his own affairs.*"

See also

*Burton* vs. *Scherof*, 63 Mass., 133;
*Commercial Telegram Co.* vs. *Smith*, 47 Hun, 494.

To the same effect is the language of Chief Judge Cullen in *Aaron* vs. *Ward, supra.*

There the plaintiff purchased a ticket and took her position in a line of defendants' patrons leading to a window at which the ticket entitled her to receive upon its surrender a key admitting her to its bath-house. When she approached the window a dispute arose between her and the defendants' employees as to the right of another person not in the line to have a key given to him in advance of the plaintiff. As a result of this dispute the plaintiff was ejected from the defendants' premises, the agents of the latter having refused to furnish her with the accommodations for which she had contracted. It was held that, regardless of whether or not the defendants were originally bound to admit the plaintiff to the bath-house, she was nevertheless entitled to re-

cover for the indignity inflicted upon her by the acts of the defendants' servants. All that the Court said regarding theatres was that the business is not "strictly" private.

In *Woolcott* vs. *Shubert, supra,* the plaintiff was a dramatic critic who was arbitrarily excluded by the defendant from his theatre and sought an injunction to restrain the continuance of such exclusion. Holding that the action would not lie, Judge Collin said:

> "The acts of the defendant were within their rights at the common law. At the common law a theatre, while affected by a public interest which justified licensing under the police power or for the purpose of revenue, *is in no sense public property or a public enterprise, it is not governed by the rules which relate to common carriers or other public utilities.* The proprietor does not derive from the State the franchise to initiate and conduct it. *His right to and control of it is the same as that of any private citizen in his property and affairs. He has the right to decide who shall be admitted or excluded.* His rights at the common law, in the respect of controlling the property, entertainments and audience, have been too recently determined by us to be now questionable."

The business of conducting a theatre being thus shown to be essentially a private business, is not affected with a public interest in the sense that it is within the legislative power to fix the price of tickets of admission whether sold by the owner of the theatre or by one acquiring ownership from the proprietor of the theater of the ticket or by one who renders the service of procuring the ticket for one desiring to visit the theatre. The mere fact that the Legislature has seen fit so to

say that it is, "affected with a public interest," does not alter the fact. It would be recognized at once as a legal absurdity for the Legislature to declare the business of a tailor, of a shoemaker, or of any other craftsman, or of any mechanic, industrial or agricultural workman to be affected with a public interest. In like manner, to declare that a dry goods merchant or a clothing merchant or a grocer is engaged in such a business would be considered startling, when one considers the consequences which this statute seeks to deduce from such a declaration. That is precisely what was ineffectually attempted to be done in *Charles Wolff Packing Co.* vs. *Court of Industrial Relations* (*supra*), approved in *Chastleton Corporation* vs. *Sinclair*, 264 U. S., 547.

Legislatures are not omnipotent. They cannot by their pronouncement change the inherent nature of things—make white—black; or night—day; or bitter—sweet. They can no more alter facts than that a man can increase his height by taking thought.

The relations between the public and these craftsmen, mechanics or merchants are of a more vital nature than those of the purchaser of a theatre ticket with the theatre owner, or with one dealing in theatre tickets or rendering service in connection with the procuring of such tickets for those desiring to attend a performance. Should it be suggested that one rendering service in connection with the purchase of a necessary of life is engaged in a business clothed with a public interest, it would at once be answered that all the legislative declarations in the world could not, under our constitutional system, permit the law-making body on the basis of such a declaration, to

undertake to fix the compensation for the service rendered or to determine the price for which the article in relation to which the service is rendered, is to be sold. If it could be done with respect to a theatre ticket, it could with equal right apply to the purchase or sale of real or personal property of any kind whatsoever, and an era of paternalism would follow compared with which the legislation of the days of Edward III, and of Elizabeth, would be innocuous.

It must necessarily follow that if the owner of a theatre has the absolute control of it and may sell tickets of admission to it to any person and on any terms that he may see fit, one who sells tickets which he has lawfully acquired from the owner of a theatre, or one who procures tickets from the theatre owner or from those to whom the latter has sold tickets, for a customer who pays for the service rendered, has the equal right to sell or procure tickets for anybody whom he may desire and on any terms that may be agreed upon between him and his patron.

The contention that the price of theatre tickets has been increased in recent years and that to some extent such increase is attributable to the ticket broker, is not only inaccurate but is entirely beside the question. The owner of the theatre may close his doors whenever he desires to do so. There is nothing to prevent him from charging whatever he is disposed to charge and he has always availed himself of that right. If his play proves popular he increases his admission charge. If he secures great artists, that fact is reflected in the price of tickets. It is well known that on holidays and on Saturday nights practically every theatre in New York advances the prices of its tickets of admis-

sion, sometimes doubling the price. The increased expense of maintaining a theatre, the tax imposed by the Federal Government on theatre tickets, and even on the amounts realized by ticket brokers on the sale of tickets or for services rendered to their customers in procuring them, as well as the universal law of supply and demand, have determined the enhanced price of tickets. The same factors have affected the prices of practically every commodity, not merely of luxuries, but of the necessaries of life.

## III.

### The opinions of Judge Lehman and Mr. Justice Martin.

(1) In the opinions rendered in both of the courts below, *People ex rel. Cort Theatre Co.* v. *Thompson*, 283 Ill. 87, 119 N. E. Rep. 41, is cited. On examination that case will be found to reaffirm the doctrine of *People* v. *Steele*, *City of Chicago* v. *Powers* and *Ex parte Quarg*, *supra*, which were distinguished from the facts there under consideration.

It involved the validity of an ordinance which applied solely to the owners of theatres. They were required to procure licenses. The ordinance also provided that every ticket of admission to a theatre shall have printed upon its face the price thereof, and that no licensee, namely, the owner of a theatre, and no officer, manager or employee of any licensee, shall directly or indirectly receive any consideration, of any nature whatsoever, upon the sale of any such ticket beyond or in ex-

cess of the price designated thereon, or directly or indirectly enter into any arrangement or agreement for the receipt of such consideration.

The Theatre Company was refused a license to conduct a theatre because it had failed to comply with this ordinance. In the defendant's answer to the petition for a writ of peremptory mandamus, it was alleged, and on demurrer by the relator was admitted, that various proprietors of theatres, including the relator, issued tickets of admission to the performances given in their places of amusement on which were printed the prices of the tickets, which were also advertised in the public press, but in truth and in fact the relator and such other proprietors had arrangements and agreements with various ticket brokers and scalpers by which a large number of such tickets were placed in the hands of such brokers and scalpers and sold for prices in advance of the price printed thereon, and the excess above such price printed on the tickets was divided between the brokers and the proprietors, the tickets being sold at higher prices for the joint benefit of the brokers and the proprietors.

In the opinion rendered, Mr. Justice Cartwright said:

> "The question to be determined is whether, in granting a license to conduct a place of public amusement subject to regulation and the police power, a provision that the licensee shall not enter into an arrangement with ticket brokers or scalpers under which the licensee and the ticket brokers or scalpers both represent that the ticket brokers or scalpers are independent dealers and owners of tickets, when in reality they are not owners, but confederates, and the ticket brokers or scalpers sell the tickets at higher prices for

the joint benefit of the licensee and themselves, and by means of falsehood and misrepresentation that all tickets to a performance have been sold a portion of the public are required to pay higher prices for the same accomodations than others, is an invasion of rights guaranteed by the State and Federal Constitutions."

In the course of the discussion it is stated:

"No ticket broker or scalper is concerned with this suit, and none is represented by the appellee, and if the ordinance merely prohibits the innocent business of ticket brokers the appellee will not be harmed. The argument, however, concerning the right of ticket brokers to buy and sell tickets and the right of the appellee to sell to them is an effort to raise a false issue in no manner involved in the question whether the court erred in sustaining the demurrer to the answer. The answer alleged that the license was refused because appellee would not agree to obey the requirement of the ordinance for impartial treatment of ticket buyers and to stop the practices set forth in the answer. There is nothing in the answer about purchasers of tickets, whether brokers or not, or their right to resell tickets at a profit. The manifest object of the ordinance is to compel impartial treatment of all buyers of tickets by the licensee. It is so interpreted by counsel for the appellants. The corporation counsel in his brief and argument says: 'The purchaser of such tickets, so far as this ordinance is concerned, may resell them at an advanced price or do anything else with them which he may desire to do.' Considering the whole ordinance with its evident purpose, it does not prohibit sales to brokers or any other class of persons, but is designed to prevent theatre owners from entering into such arrangements as are stated in the ordinance."

Referring to this decision Judge Lehman, in the present case (237 N. Y. 325) says:

> "Whether the public character of the places of amusement pointed out in this decision is in itself sufficient to give the Legislature power to control the prices which may be charged by the proprietor of places of public amusement has not even been considered by us, for the present statute does not attempt to fix the price which may be charged by the proprietor, but merely requires him to 'print on the face of each such ticket or other evidence of the right of entry the price charged therefor' by him. No theatre proprietor is now challenging that provision, so we are not called upon to express any opinion concerning its validity, though a similar provision in an ordinance of the City of Chicago was sustained in the case of *People* v. *Thompson, supra.*" (*Rec., p. 49, fol. 85.*)

We have already shown the purpose which led to this requirement in the Chicago ordinance. It was in no sense intended to limit the price which the broker who actually owned the theatre ticket could charge for it.

The Court likewise refrained from deciding that a person who assumed to furnish tickets of admission to the public had subjected himself to the control of the Legislature in regard to the price which he might demand for the ticket. At least that is what we understand by the remarks made in the sentence beginning at the bottom of page 325. (*Rec., p. 49, fol. 82.*)

(2) Apparently the opinion of the Court of Appeals revolves around the succeeding sentence, where Judge Lehman says:

> "The Legislature has, however, pointed out that the statute is enacted 'for the pur-

> pose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses,' and we may profitably consider in the first place whether 'extortion,' or exorbitant prices exacted by oppression, instead of fixed by free agreement, is not the real abuse which the Legislature is seeking to remedy, and, if so, whether the Legislature has the power to remedy the abuse of 'extortion' by price regulation."

It may be useful to call attention, by way of parenthesis, to the similarity between the denunciatory terms "*fraud, extortion, exorbitant rates and similar abuses,*" as quoted from the act under review, and the terms "*covetise, malice, coaction* and *extortion,*" used in the Statutes of Laborers, *supra.* In both these terms are made the pretext for price fixing.

The learned Judge concedes that the word "extortion" is not used in the sense in which it is employed in the New York Penal Law (Section 850). It is suggested that the Legislature intended by that word to refer to "the exaction of money made possible because of oppressive conditions or circumstances, as distinguished from the receipt of money as a result of free negotiations and willingly paid for a service or commodity." (*Rec., p. 50, fol. 86.*)

It is significant, however, that, regardless of the pronouncement contained in Section 172 of the act, which relates to the restriction of price, there is not a word in the enactment itself which deals with or defines extortion, fraud or exorbitant rates. They are mere epithets and therefore futile (*Fogg* v. *Blair*, 139 U. S. 127; *Kent* v. *Lake Superior Canal Co.*, 144 U. S. 91; *United States* v. *Cohen Grocery Co.*, 255 U. S. 89 to 91). It

merely prohibits a ticket broker from reselling a ticket "at a price in excess of fifty cents in advance of the price printed on the face of the ticket." So far as the statute is concerned, the resale of a ticket at such advance may be the result of free negotiations and may have been willingly paid for the ticket or for the service rendered by the broker in procuring the ticket for the purchaser. Indeed, even if the latter requested the broker to act for his accommodation in order to secure a seat specially suitable to his needs, so that there could be no possible question of the exaction of money by oppressive conditions, the statute none the less makes the act of the broker in selling the ticket at an advance of more than fifty cents above the printed price, a misdemeanor.

The Court of Appeals recognized the difficulty of its position, for as is shown by the following excerpt from an address recently delivered by Chief Judge Hiscock of the New York Court of Appeals, before the Association of the Bar of the City of New York (New York Law Journal, September 6, 1924):

> "The most recent decision of the Court upholding police regulation was the one giving the stamp of approval to the statute regulating the business of brokers engaged in selling theatre tickets and for which there was great demand in New York City. That decision is liable to be misunderstood unless considered with some care. It did not uphold the statute in question as a statute fixing the price of theatre tickets, but on the ground that the sale of tickets by brokers intimately connected with theatres, which have long been held to be subject to regulation, was so controlled and conducted that it was liable to be productive of fraud and extortion in the pur-

chase of tickets, and that therefore it might be properly regulated."

When analyzed, the opinion, in fact, upheld the statute as a price-fixing law, because, stripped of all verbiage, it is that and nothing else.

(3) At page 328, (*Rec., p. 51, fol. 87*) Judge Lehman instances the ancient statutes against "engrossing" and "forestalling" as being "essentially examples of such legislative mandates" as the law now in question is claimed to be.

The statute is, however, significantly devoid of any such suggestion. There is no reference to engrossing or forestalling, in words or effect, directly or indirectly. However innocent of such a purpose the broker may be, however useful his service to the purchaser of the ticket, and however desirous the latter may be of paying the price at which the ticket was resold, nevertheless, if the broker receives more than fifty cents above the printed price, he is guilty of a misdemeanor, and if he has procured a license, it becomes at once revocable and he becomes liable upon his bond. In this aspect the statute under review not only differs from the "ancient statutes," but is totally different from the ordinance considered in *People ex rel. Cort Theatre Co.* v. *Thompson, supra.*

A mere outcry against fraud, extortion and exorbitant rates does not justify this legislation, since its prohibition or the offence which it creates is not predicated on proof of fraud or extortion or the charge of an exorbitant rate. Given a sale "at a price in excess of fifty cents in advance of the price printed on the face of the ticket," a misdemeanor has been committed, however free from fraud or extortion or exorbitancy the transaction may have been.

(4) The opinion of Judge Lehman further comments on the testimony that those engaged in the business of reselling tickets *are compelled by theatre managers,* even before the first performance of a new play, to buy and pay for seats eight weeks in advance.

The statute does not forbid the purchase by ticket brokers from the theatre managers of tickets in advance of the staging of a play. The usefulness of a broker to the public depends on his ability to serve and to secure seats for those who otherwise would be unable to procure them, e. g. accommodations suited to a playgoer who is deaf or of impaired sight which he might not be able to secure, or which if a stranger he could not obtain. It is therefore necessary to acquire in advance tickets to satisfy these various demands.

The business of a broker being recognized as lawful, there is nothing in the statute which renders such an acquisition of tickets a violation of law. *The compulsion exercised by theatre managers is not sought to be punished.* In that respect this case differs fundamentally from *People ex rel. Cort Theatre Co.* v. *Thompson.* Here there is no element of conspiracy between the brokers and the theatre owners, such as there was in the case cited. Nor are the pains and penalties of this act directed against the theatre managers who have exercised this compulsion. The only obligation which the statute imposes on them is that of printing on the face of each ticket the price charged for admission to the theatre, and the only violation for which the theatre manager may be punished is his failure to print "the price charged for the ticket" by him. The statute does not even prohibit the theatre man-

ager from actually receiving for the ticket sold by him a price in excess of fifty cents above that printed on the face of the ticket. In fact Judge Lehman, referring to this statute on page 330, says:

> "It does not prohibit the producing manager from charging the public all that the public will pay, but leaves the regulation of price between producer and consumer to the free play of the laws of supply and demand. It does not even prohibit brokers from obtaining control of the supply of choice seats in advance of public sale. It merely prohibits brokers from charging more than a fixed and presumably reasonable profit whether they acquire such control or not and thereby it reasonably tends to end the extortion which, the Legislature could properly find, exists and constitutes an abuse which is so general and of such importance as to call for legislative remedy" (*Rec., 52, fol. 88*).

The last sentence quoted, it is submitted, is a *non sequitur* to the two previous sentences. In spite of what has been said in other parts of the opinion, it indicates that the statute is a price-fixing statute so far as it relates to the service rendered by the broker. It is not based on the theory that the brokers have acted unlawfully or fraudulently. *Mutatis mutandis* the same reasoning might be indulged if, instead of relating to theatre tickets, the broker whose charges were to be regulated had been concerned in selling a food product, textiles, live-stock, land, pictures, or any other property. The interpolation of the word "extortion" by way of characterization, cannot make that illegal which otherwise would be entirely lawful.

(5) Equally erroneous is the statement (*pp. 330, 331*):

> "But, even if we were to assume that the interest of the public in such business is not in itself sufficient to justify regulation of price, yet a statute which reasonably limits the amount which brokers may charge upon the resale of a ticket in order to end the abuse of extortion of large additional amounts by reason of the control of the supply should not be condemned merely because the Legislature has seen fit to use price regulation as the instrument which may accomplish the desired purpose" (*Rec., p. 52, fol. 89*).

The same process of reasoning would permit the Legislature to resort to price regulation for the purpose of dealing with any imaginable abuse that might arise in any conceivable business. If the business itself cannot be forbidden merely because of the existence of some abuse, it would seem to follow that if price-fixing, as such, is unconstitutional, it cannot be justified merely because it might drive those engaged in the business out of it.

> *Adams* vs. *Tanner*, 244 U. S. 594, 595.
> *People ex rel. Tyroler* vs. *Warden of City Prison*, 157 N. Y. 123, 124.

The frequent repetition of the idea that the brokers have a control of the supply of tickets, is not in conformity with the facts. In Manhattan and Brooklyn there are 108 first class theatres. In Manhattan there are 283 moving picture theatres, in Brooklyn 315, in Queens 71 and in Richmond 9. Moreover, there are many other places of amusement in these localities. To say, therefore, that the brokers have a control of

the supply of tickets, is an unwarranted assumption. The circumstance that, in order to supply themselves with the commodity which the public seeks to secure through them, they are obliged to lay in a stock of tickets for various theatres, by no means constitutes a control of the supply, even though the aggregate number of tickets that may at certain times be in the possession of all of the brokers combined may be substantial. The various brokers are however, in sharp competition with one another. Unless they can sell their tickets they would be ruined financially, because of the very considerable expense involved in carrying on their business.

The same argument could be made with regard to dealers in furs, silk fabrics, or any other article of trade in which the supply may be limited and is at times held by a restricted number of brokers or dealers. The fact that they regulate their prices in accordance with the demands of fashion or the public preference and secure a larger profit because of being able to meet the sometimes inexplicable taste of the public, would certainly not sustain a price-fixing statute. If it did, it would be destructive of trade and commerce and an encroachment upon liberty.

(6) On page 329 Judge Lehman says:

> "The Legislature has the power to regulate reasonably acts which lead to abuses, through which the general public is compelled to pay a group of men for services which at least in part are not desired by the public, especially where such acts occur in a business which is measurably affected with a public interest" (*Rec., pp. 51, 52, fol. 88*).

Here, again, it is important to distinguish between legislation which defines abuses and then

seeks to deal with them, and legislation which imposes a burden upon a legitimate business which is likely to destroy it or drive those who are engaged in it out of the business, by the process of price-fixing. Surely it is not within the legislative power to fix the price at which a theatre manager may sell his tickets, or to secure for the public cheap tickets, or to determine how much the public may voluntarily pay the ticket broker who serves it and who does so because of the public demand for his services. The fact that a part of the public does not desire the services of the broker is not a justification for legislation leading to the abolition of ticket brokerage. The wishes of those who do not desire to avail themselves of that convenience should not prevail over those of others who habitually do. Surely a matter of this kind cannot be determined by a plebescite, and whatever may be the views of A, they should not determine for B whether or not he may secure the services of ticket brokers to supply him with theatre tickets in payment for that service whatever sum he may agree upon with the broker as suitable compensation. If the public did not desire the services of ticket brokers, inexorable economic laws would speedily eliminate the broker. It is because he is found to be useful that he plays a part in the acquisition of theatre tickets by the theatregoing public.

(7) In the course of the opinion of the Appellate Division, Mr. Justice Martin said (*207 App. Div. 342*):

> "The evils of theatre ticket speculating are undisputed. The street speculator in particular has become a nuisance. His purpose is to prey on the people by selling his tickets

at an extortionate price'' (*Rec., p. 33, fol. 59*).

If this is intended as a statement that it is not disputed that the business of a ticket broker is an evil, it is certainly an erroneous assumption. We contend that the broker subserves a very useful purpose, beneficial, and not injurious, to the public. The opinion of the Court of Appeals p. 321 so concedes (*Rec., p. 46, fol. 82*).

The reference to the street speculator is entirely gratuitous. It is not pretended that Weller was a street speculator, or that the act under consideration was aimed at street speculators. They are an entirely different class of persons from those to whom this statute applies. By a previous act (New York Laws of 1921, Ch. 12) specific provision was made, with the concurrence of the brokers against whom this act is aimed, which prohibited the activities of ticket speculators in the streets of a city. It added Section 1534 to the Penal Law, as a part of Article 148, relative to nuisances. It was unquestionably within the power of the Legislature to regulate the use of city streets, especially in so far as it might be attempted to conduct in any such street, in or about the premises of any theatre or concert hall or place of public amusement, the business of selling or offering for sale tickets of admission to a performance therein. Apparently the learned Justice confounded the street speculator with the legitimate dealer in theatre tickets in an orderly manner in a place of business maintained for that purpose.

(8) Mr. Justice Martin says (*207 App. Div. 342; Rec. p. 33, fol. 58*):

> "Historically considered, theatres may be regarded as 'affected with a public interest.' A. E. Haight, in his book 'The Attic Theatre,' at page 4, said: 'To provide for the amusement and instruction of the people was, according to the Greeks, one of the regular duties of a government; and they would have though it unwise to abandon to private ventures an institution which possessed the educational value and wide popularity of the drama.'"

It may be safely said that no such idea prevails in this country. Certainly a theatre is not regarded as affected with a public interest in the sense that land may be condemned under the power of eminent domain for the building of a theatre. That would not be regarded as taking property for a public use. In fact it has been held that the taxing power may not be exercised for the establishment and operation of moving picture theatres (*State ex rel. Toledo* v. *Lynch*, 88 Ohio St. 71; 48, L. R. A., N. S., 720). Nor, judging from many of the plays which now degrade the stage and are offensive to a considerable part of the public, may it be said that they contribute to public education. At all events, the primary purpose of the theatre is to amuse and entertain.

Referring to the passage quoted, it may not be out of place to say that after the Greeks came the Puritans, whose influence upon our constitutional form of government is more immediate and lasting than that of Ancient Rome or of Athens, and that the Pilgrim Fathers, as well as some of the prominent framers of our Constitution, would have been astounded had it been intimated to them that the theatre was "affected with a public interest," as that phrase is used in the act now under consideration.

(9) With considerable heat, and, we submit, with some inconsistency, Mr. Justice Martin says (*207 App. Div. 353; Rec., p. 44, fol. 79*):

> "The statute now under consideration not only permits the resale of tickets, but allows any suitable person who desires to do so to pursue the occupation of reselling tickets. It does not limit or fix the price which the theatre may charge for tickets. It does not interfere with the sale at any price that the theatre sees fit to charge, but it provides that any one who wishes to carry on the business of reselling tickets must do so after he obtains a license, and that, when he does obtain the license, he must sell the ticket at a profit which is fair and reasonable. It strikes at the extortioner only. It prevents fraud and the exaction of an extortionate price from the people who desire to purchase theatre tickets. The act regulates the charges of the speculator or broker. It prohibits those who have a monopoly of the tickets, made possible by the arrangements with the theatres, from charging extortionate fees for 'service' in securing and selling tickets."

The concession that the theatre owner is not prevented from selling the ticket at any price he may fix, without limitation of any kind, is in the same breath coupled with the incongruous idea that the ticket broker is enabled, by arrangement with the theatres, to have an imaginary monopoly of the theatre tickets. The shafts of judicial denunciation are thus aimed at the broker, who is described as an extortioner and whose compensation for service rendered is referred to ironically.

This is nothing but a begging of the question. If the ticket broker is an extortioner or is guilty of fraud, which we deny, then the statute should define and punish acts of fraud and extortion.

This the act under consideration studiously fails to do. The Legislature contents itself with arbitrarily fixing the compensation to which a broker is entitled for actual service, however honestly and honorably rendered, however free from fraud, extortion and exaction, and however welcome and convenient to those who visit the theatre and have not the time to stand in line at its doors and to take their chances of securing the accommodations which they desire and for a time to suit their convenience.

Calling names does not advance the elucidation of a question relating to constitutional rights.

(10) At 207 App. Div. 349 (*Rec. pp. 39, 40, fol. 70*) Mr. Justice Martin, referring to the fact that the ticket brokers were often required by the theatre owners to purchase tickets for weeks ahead, said:

> "This combination of theatre owner or manager with speculator or broker by which the attraction is financed or underwritten by the ticket broker or speculator, tends to a monopoly which prevents the public from seeing the performance on any reasonable terms."

The inference from the fact that the broker makes a quantity purchase of tickets from the theatre owner, that there is a combination between them which tends to a monopoly, is far-fetched and unfounded. The broker buys the tickets in advance because he needs them to supply his customers, and the theatre owner takes advantage of the opportunity to require the broker to make quantity purchases of tickets and is thus enabled to find a market for his commodity which otherwise he might not be able to sell. Far from being

a combination, the theatre owner and the broker are dealing at arm's length. This does not create a monopoly or prevent the public from seeing the performances at the various theatres.

The situation is precisely the same as that which exists when a middleman makes a quantity purchase from a manufacturer or producer, in order to enable him to supply the needs of his customers. In such instances the middleman frequently pays the manufacturer or producer in advance for the merchandise subsequently manufactured and delivered, and facilitates the latter in the financing of his business. That does not constitute a combination or monopoly, even though the fabric or product may be of unique character, and is especially desirable because it bears a popular trademark.

Even if there were no brokers the owner of a theatre producing a popular play might sell out his house, as it is called, for weeks ahead, and, as is conceded, might charge for his tickets of admission any price he desires. From the very nature of things the number of tickets, and especially of front seats for any theatrical performance is limited by the capacity of the theatre and the length of the run, which depends on unknown factors. It might, therefore, be argued with equal justice that if the theatre owner increased the price of his tickets, he would be engaged in carrying on a monopoly "which prevents the public from seeing the performance." If that is a monopoly a revision of that term would become necessary.

## IV.

**Assuming, that if standing alone that part of the statute requiring the taking out of a license and the giving of a bond could be sustained, the fact that after taking out a license and giving a bond the licensee would be debarred from questioning the validity of the statute and from contesting proceedings for the revocation of the license and the enforcement of the penalty of the bond because of non-compliance with Section 172, the act is unconstitutional in its entirety.**

The clause fixing the price at which tickets may be sold by a broker is so interwoven with the license provision that they cannot be separated. Hence, if the "price clause" is unconstitutional, the act as an entirety must fall.

If the license provision of the act could be absolutely separated from the price-fixing clause, a different question from that now before the Court would be presented. In that event, the fact that the Legislature has declared that in case it should be judicially determined that any section of the article is unconstitutional or otherwise invalid, such determination should not affect the validity or effect of the remaining provisions of the article, would doubtless become operative. That declaration merely lays down the well-known rule that has long obtained in constitutional law. It does not, however, control the Court in the exercise of its judicial function to pass on the unconstitutionality of a statute, nor would it justify the Court in declaring any part of this act constitutional, if the taint of unconstitutionality affects every phase of the legislation.

That is the case here. In order to obtain a license, it is necessary for the applicant to give a bond. The bond is to be in the penal sum of $1,000. *Among the conditions of the bond is one that the obligor will not exact or receive a price for any ticket or evidence of the right of entry to a theatre in excess of the price authorized by the article.* A suit to recover on the bond may be brought by the Comptroller on the relation of any party aggrieved in the event that the obligor has violated "*any of the conditions of the bond,*" and in such case, the recovery is for the full penal sum of the bond, even though the party aggrieved may have paid ten cents only in excess of the price fixed by the statute.

Moreover, if after the license has been issued, the licensee charges for any ticket a price in excess of that authorized in the article, his license may be revoked and if he should thereafter engage in the business of selling theatre tickets he would be guilty of a misdemeanor.

It is thus clear that the yellow thread of unconstitutionality, namely, the illegal price regulation, runs through every part of the fabric of this statute. Hence, one who stands on his constitutional right of entering into a contract without restriction as to the compensation which he charges for his services in procuring or for the selling price of a theatre ticket which he has acquired, is necessarily precluded from applying for a license. If he make such application, he must give a bond, which he at once forfeits upon selling a ticket on conditions other than those specified in the statute, and *eo instanti* subjects the license procured by him to revocation, and upon such revocation further subjects himself to prosecution for a misdemeanor for continuing in a business which he

can only conduct on the condition that he surrenders his right to sell tickets to his customers at a price in excess of that fixed by the statute.

The statute is, therefore, so coercive in its nature as to compel those engaged in this business either to waive a constitutional right against their will, by procuring a license and giving a bond which would preclude them from asserting their constitutional right, or to refrain from taking out a license and from giving the bond and from continuing in the exercise of that constitutional right.

If, therefore, our premise is sound, as we believe it to be, that it is beyond the power of the Legislature to limit the compensation of a ticket broker for the service rendered by him or to fix the price to be charged for tickets sold by him, as proposed in this act, it must necessarily follow that the scheme of this legislation is entirely void.

It is not an answer to say that the Legislature might have passed a licensing act which is constitutional, or that it might require a bond as a condition to the issuance of a license, or that such bond might be conditioned that the obligor will not be guilty of any fraud, or that the license might be revoked in case the licensee shall be guilty of any fraud or misrepresentation. The difficulty lies in the fact that the condition of the bond is not limited to liability upon it in the event of guilt of a fraud by the obligor. Nor is the license to be revoked solely in case the licensee is guilty of fraud or misrepresentation. In each instance, the charge or receipt of a price for a ticket in excess of that authorized by the act forfeits the bond and is cause for a revocation of the license.

This brings us to the discussion of the authorities bearing on the effect of the taking of a license

and the giving of the bond required as the condition of procuring a license upon the defendant's right to contest the validity of the price-fixing provisions of the act.

(*1*) *The taking out of a license and the giving of a bond precludes the licensee from subsequently attacking the constitutionality of the statute requiring such license and bond.*

This is the unquestioned law of New York as evidenced by many decisions in *Musco* vs. *United Surety Company*, 196 N. Y., 459. There the statute required all persons receiving deposits of money for the purpose of transmitting it to foreign countries to give a bond to the People of the State for the faithful holding and transmission of all such moneys. A person so receiving deposits gave a bond as required by the statute. The plaintiff sued upon the bond and the principal and his surety defended on the ground that the act pursuant to which the bond was executed was unconstitutional. The Court of Appeals held that they were estopped from questioning the constitutionality of the statute. Judge (now Chief Judge) Hiscock, rendering the opinion of the Court, said at pages 463, 465:

> "The appellant and its principal have waived any question concerning the constitutionality of the act in question. That act in effect prohibited appellant's principal from carrying on the business of receiving deposits unless he should execute an undertaking as therein provided. Conversely, in effect, it authorized him to conduct such business if he should execute such a bond. He very well may have concluded that it would be to his advantage in the conduct of the business to give such an undertaking, whether he could

be compelled so to do or not, and he executed one. Having done this, and respondent's assignors having made deposits with him, as we must assume, on the faith of such undertaking, neither he nor his surety can now raise the question of constitutionality, for it is well settled that an individual may waive even constitutional provisions for his benefit when no question of public policy or public morals is involved. (*Mayor, etc., of New York* vs. *Manhattan Ry. Co.*, 143 N. Y., 1; Cooley's Constitutional Limitations [7th ed.], page 250.)

"If the principal could and did waive any question of constitutionality of the act, the appellant cannot raise such question, for certainly its position as a surety for a consideration is not any stronger than that of its principal.

"Appellant seeks to break the force of an apparent waiver by its principal by insisting that the undertaking was executed under duress, the act providing that a person who carried on the business in question without executing such undertaking should be guilty of a misdemeanor. * * *

"If the act requiring the principal to execute an undertaking was unconstitutional and void, he must be assumed to have known it at the time, and he was entitled to believe that no one would attempt to enforce against him an unconstitutional act. The mere possibility that some one in the future might attempt so to do was altogether too remote a consideration to operate as a coercive influence on his mind when he executed the undertaking which amounted to legal duress."

To the same effect is *Guffanti* vs. *National Surety Company*, 196 N. Y., 453.

In *Russo* vs. *Illinois Surety Company*, 141 App. Div., 690, the New York Appellate Division,

Second Department, decided that by going on the bond of its principal the defendant had waived its right to question the constitutionality of the act, although it might be admittedly unconstitutional. The Court said by Mr. Justice Thomas, at page 691:

> "It is not within the power of the Legislature to compel a debtor to give security for an existing debt. May it then constrain the delivery of such security by prohibiting, in case of failure, the continuance of the business? If the act be unconstitutional, the parties could and did waive the invalidity of the requirement. (*Musco* vs. *United Surety Co.*, 196 N. Y., 459.)"

*Huson* vs. *Brown*, 90 Misc., 175, (New York Supreme Court) arose under Section 284 of the Agricultural Law requiring a commission merchant in farm produce to give a bond. In an action upon the bond given by the defendant, the Court refused to permit the defense that the act was unconstitutional. Mr. Justice Greenbaum, writing the opinion of the Court, said, at page 177:

> "The defendant surety also attacks the constitutionality of the statute, but its principal, R. B. Brown, Inc., by giving the bond and receiving produce as a licensed commission merchant, has effectually waived its right to raise this question, and as surety defendant stands in no better position that its principal. *Musco* vs. *United Surety Co.*, 196 N. Y., 459. It follows that a verdict must be directed in favor of the plaintiff."

Similar in principle are the following decisions of this Court:

*Pierce* vs. *Somerset Railway*, 171 U. S., 641, 648.

*Pullman Company* vs. *Kansas*, 216 U. S., 56, 66.

*Wall* vs. *Parrot Silver & Copper Co.*, 244 U. S., 407, 411.

*Pierce Oil Corporation* vs. *Phoenix Refining Co.*, 259 U. S., 125, 128.

*St. Louis Co.* vs. *Prendergast Co.*, 260 U. S., 461, 471.

It will be appropriate to call attention to other decisions bearing upon this aspect of the case.

In *Matter of Cooper*, 93 N. Y., 507, the Court said by Judge Danforth, at page 512:

> "It is very well settled that a party may waive a statutory and even a constitutional provision made for his benefit, and that having once done so he cannot afterward ask for its protection. (*Lee* vs. *Tillotson*, 24 Wend., 337; *Embury* vs. *Conner*, 3 N. Y., 511; Cooley's Const. Lim. 181.) The appellant is in this position. He participated as an actor in procuring the order which he now seeks to set aside, and took his chance for a satisfactory valuation of his property for the purpose contemplated by the act. To that end there was not only acquiescence on his part, but intelligent and efficient dealing with the matter and consent to the other. By this consent he must be deemed to have made his election and should be held to it.

In *Embury* vs. *Conner*, 3 N. Y., 511, it was decided that the right to challenge the constitutionality of a statute permitting the taking of private property for a private purpose without the consent of the property owner might be waived, Judge Jewett, saying (page 518):

"It was there held that a person might renounce a constitutional provision made for his benefit, and that if a private road be laid out pursuant to the statute, with the consent of the owner of the land, the proceeding was valid, and that such consent need not be in writing; that a parol consent was sufficient; and that the bringing of an action after the road was so laid out and his damages had been assessed, was a sufficient manifestation of consent, and an adoption of the machinery provided by the statute for effectuating the grant. *Lee* vs. *Tillotson* (24 Wend., 337) and *The People* vs. *Murray* (5 Mill, 472) are cases to show that a party may waive a constitutional as well as a statute provision made for his own benefit."

In *Mayor, etc. of New York* vs. *Manhattan Railway Co.*, 143 N. Y., 1, 26, Judge Peckham, later Mr. Justice Peckham of this Court, passed upon this question with his usual precision and clarity:

"The question is whether, by virtue of these various actions of defendant and its predecessors, together with the acceptance of subsequent legislation on the subject, based upon the assumed validity of the act of 1868, there has not been a waiver of the defense that the act was unconstitutional. Persons, or corporations even, may waive in some matters, and upon some occasions, a constitutional or statutory provision in their favor. *Embury* vs. *Conner*, 3 N. Y., 511; *In re Application of Cooper*, 93 id., 507-512; *In re Petition of K. R. Co.*, 98 id., 447-453; *Sentenis* vs. *Ladew*, 140 id., 463-466.) In the last cited case it is said: 'A party may waive a rule of law, or a statute, or even a constitutional provision, enacted for his benefit or protection, where it is exclusively a matter of private right, and no considerations of public morals are involved, *and*

*having once done so he cannot subsequently invoke its protection.'* Although the provision as to a local act containing but one subject, which shall be expressed in its title, is of a public nature and was placed in the Constitution for the purpose of preventing surprises as to the object and purpose of any proposed legislation, yet when an act has been so passed, and its enactments bear upon the private rights of an individual, the constitutional provision then becomes as to him, one which is, within the meaning of the expression, enacted for his benefit, and it is then a matter which such individual may, as to his private rights, waive the benefit of, and consent to perform or submit to the requirements of the act, the same as if the constitutional provision had not been violated. And when once such waiver has been made and such consent been given, the party so waiving and consenting is forever concluded thereby."

To the same effect are:

*People* vs. *Quigg,* 59 N. Y., 88, 89;
*People* vs. *Fire Assn. of Philadelphia,* 92 N. Y., 325, 326;
*Conde* vs. *Schenectady,* 164 N. Y., 263;
*Connors* vs. *People,* 50 N. Y., 240.
*Dodge* vs. *Cornelius,* 168 N. Y., 242;
*Shepard* vs. *Barron,* 194 U. S., 553, 568;
*Chicago-Sandoval Coal Co.* vs. *Industrial Commission,* 301 Ill., 389.

If then any part of this act be unconstitutional the defendant had the undoubted right to raise the point and test its constitutionality. But if he gave his bond and took out his license, as appears by the foregoing authorities, his right to attack the constitutionality of the law requiring such bond and license would have been lost.

*(2) If the licensing provision of the act standing by itself were constitutional, the defendant can not be charged with a misdemeanor for non-compliance therewith if the price-fixing clauses of the act are invalid and he would be precluded from attacking them, because of his compliance with the licensing provision.*

If this were not the law a citizen might be deprived of his property without due process of law and denied the equal protection of the law, as guaranteed by Section 1 of the 14th Amendment to the Constitution of the United States.

This proposition was determined in *Ex parte Young*, 209 U. S., 123, 145-147. There the court had before it the question of the constitutionality of the Minnesota act creating a Railroad and Warehouse Commission, with rate-making powers, and providing certain penalties in the event that its provisions were violated. The Court held that while there is no rule permitting a person to disobey a statute with impunity at least once for the purpose of testing its validity, nevertheless, where such validity can only be determined by judicial investigation and construction, a provision in the statute which imposes such severe penalties for disobedience of its provisions as to intimidate the parties affected thereby from resorting to the courts in order to test its validity, it in effect practically prohibits them from seeking such judicial construction and consequently denies them the equal protection of the law. Mr. Justice Peckham in rendering the opinion of the court enunciates this principle clearly (page 145):

> "Coming to the inquiry regarding the alleged invalidity of these acts, we take up the contention that they are invalid on their face

on account of the penalties. For disobedience to the freight act of the officers, directors, agents and employes of the company are made guilty of a misdemeanor, and upon conviction each may be punished by imprisonment in the county jail for a period not exceeding ninety days. Each violation would be a separate offense, and, therefore, might result in imprisonment of the various agents of the company who would dare disobey for a term of ninety days each for each offense. Disobedience to the passenger rate act renders the party guilty of a felony and subject to a fine not exceeding five thousand dollars or imprisonment in the state prison for a period not exceeding five years, or both fine and imprisonment. *The sale of each ticket above the price permitted by the act would be a violation thereof.* It would be difficult, if not impossible, for the company to obtain officers, agents or employes willing to carry on its affairs except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided for in violating orders of the Commission. *The company, in order to test the validity of the acts, must find some agent or employee to disobey them at the risk stated. the necessary effect and result of such legislation must be to preclude a resort to the courts (either State or Federal) for the purpose of testing its validity.* The officers and employes could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the Court should decide that the law was valid. The result would be a denial of any hearing to the company."

In *Ex parte Young* the Court quotes with approval the words of Mr. Justice Brewer in *Cotting* vs. *Kansas City Stock Yards Company*, 183 U. S., 79, 102:

> "It is doubtless true that the State may impose penalties, such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the Legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws."

In the instant case if the defendant attempts to stand on his rights and refuses to give a bond and take out a license, as required by the act, for the purpose of raising the question of the constitutionality of this act, he is liable daily to arrest and conviction under the terms of the act for carrying on his business, which, as already shown, is inherently lawful.

In *Harrison* vs. *St. Louis & San Francisco R. R. Co.*, 232 U. S., 318, the Court passed on the constitutionality of a statute penalizing any one who resorted to the Federal Courts on the ground of diversity of citizenship. Chief Justice White said (page 331):

> "Indeed, the statute goes much further, since when an application to remove is made, in order to prevent a judicial consideration of its merits even by the state court, it in effect commands the Judge of such court on the making of the application to refuse the same and to certify the fact that it was made, to a state executive officer, to the end that such officer

> should without judicial action strip the petitioning corporation of its right to do business, besides subjecting it to penalties of the most destructive character as a means of compelling acquiescence. When the nature of the statute is thus properly appreciated, nothing need be further said to manifest its obvious repugnancy to the Constitution or to demonstrate the correctness of the decree of the Court below."

In *Mercantile Trust Company* vs. *Texas, etc., Ry. Co.*, 216 Fed., 225, the Circuit Court for the Eastern District of Louisiana, passed upon a statute similar to the one considered in the *Harrison case, supra.* There, too, the Court held that the penalties for disobeying such statute were so extreme that foreign corporations would generally be deterred from litigating the question of the right of the State to enact such amendment, and consequently it was violative of the Fourteenth Amendment of the Federal Constitution as depriving such corporation of its property without the due process of law. Saunders, D. J., passing on this point said at page 231:

> "The penalties thus denounced against corporations which violate the constitutional amendment are so drastic that they would involve the immediate and certain ruin of the corporation. The defendant in this case is a common carrier, and its very existence depends upon its power to make contracts from day to day."

As shown above, the entire act is founded upon and inseparably bound up with the purpose of prohibiting the resale of tickets of admission at an advance greater than fifty cents a ticket.

(3) *That a statute unconstitutional in a part essential and vital to its whole scheme cannot be enforced by the courts in its other provisions is likewise a well settled principle.*

This principle has been recently laid down in a number of important cases. Thus in *Lemke* vs. *Farmers Grain Co.*, 258 U. S., 50, Mr. Justice Day at pages 59 and 60, said:

> "Applying the principle here, the statute denies the privilege of engaging in interstate commerce except to dealers licensed by state authority, and provides a system which enables state officials to fix the profit which may be made in dealing with a subject of interstate commerce.
>
> It is insisted that the price fixing feature of the statute may be ignored, and its other regulatory features of inspection and grading sustained if not contrary to valid Federal regulations of the same subject. *But the features of this act, clearly regulatory of interstate commerce, are essential and vital parts of the general plan of the statute to control the purchase of grain and to determine the profit at which it may be sold.* It is apparent that without these sections the State Legislature would not have passed the act. Without their enforcement the plan and scope of the act fails of accomplishing its manifest purposes. We have no authority to eliminate an essential feature of the law for the purpose of saving the constitutionality of parts of it. *International Textbook Co.* vs. *Pigg*, 217 U. S., 91, 113, and cases cited."

In *International Textbook Co.* vs. *Pigg*, 217 U. S., 91, 112 the same doctrine was enunciated, Mr. Justice Harlan rendering the opinion of the Court (pages 112, 113):

"It results that the provision as to the Statement mentioned in Sec. 1283 must fall before the Constitution of the United States, and with it—according to the established rules of statutory construction—must fall that part *of the same section* which provides that the obtaining of the certificate of the Secretary of State that such Statement has been properly made shall be a condition precedent to the right of the plaintiff to maintain an action in the courts of Kansas. Section 1283, looking at the object for which it was enacted, must be regarded as an entirety. These parts of the statute are so connected with and dependent upon each other that the clause relating to actions brought in the courts of Kansas cannot be separated from the prior clause in the *same section* referring to the Statement to be filed with the Secretary of State, and the former left in force after the latter is stricken down as invalid. As the clause about suits in the courts of Kansas *expressly refers* to the prior clauses *in the same section* prescribing the Statement to be filed with the Secretary of State, the clause relating to suits would be meaningless without reference to the latter. We cannot suppose, from the words of the statute, that the Legislature would have adopted the regulation about actions in the State courts except for the purpose of enforcing the prior clause in the same relating to the Statement to be filed with the Secretary of State. The several parts of the section are not capable of separation if effect be given to the legislative intent. *It is well settled that if a statute is in part unconstitutional the whole statute must be deemed invalid, if the parts not held to be invalid are so connected with the general scope of the statute that they cannot be separately enforced, or, if so enforced, will not effectuate the manifest intent of the Legislature.*" (Italics ours.)

The most recent case on the subject, *Hill* vs. *Wallace*, 259 U. S., 44, 70 is especially applicable here. It involved the validity of a "future" trading act, which imposed a tax of twenty cents a bushel on all contracts for the sale of grain for future delivery, with certain exceptions. Section 11 of the statute directed that "*if any provision of this act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the act and of the application of such provision to other persons and circumstances shall not be affected thereby.*" This was held to be merely an assurance that separable valid provisions may be enforced consistently with legislative intent, but that it did not, and could not, empower the courts to amend inseparable provisions of the act by inserting limitations which it did not contain. Chief Justice Taft, discussing this phase of the case, said:

> "Section 4 with its penalty to secure compliance with the regulations of Boards of Trade is so interwoven with those regulations that they cannot be separated. Section 11 did not intend the Court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the Court. In *United States* vs. *Reese*, 92 U. S., 214, presenting a similar question as to a criminal statute, Chief Justice Waite said (page 221):
>
> 'We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there.

> Each of the sections must stand as a whole, or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. * * * To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.' *Trade-Mark Cases,* 100 U. S., 82; *Butts* vs. *Merchants & Miners Transportation Co.,* 230 U. S., 126."

In *Pollock* vs. *Farmers Loan & Trust Co.,* 158 U. S., 601 it was held that when a single comprehensive scheme of taxation is provided for in an act and the different parts are interdependent, the whole statute must fall by reason of the unconstitutionality of one of the essential provisions.

So in *Howard* vs. *Illinois Central R. R. Co.,* 207 U. S., 463, the First Employers' Liability Act was held unconstitutional because of provisions which it contained, regulating intrastate commerce.

It is likewise settled law that even if a statute or ordinance contains provisions which, in another setting, might be free from the taint of unconstitutionality, if they are so interwoven in the texture of the statute or ordinance with other provisions, which are void, as to preclude the idea that they can be of operative fitness to effectuate the will of the law-making body, the entire statute or ordinance is rendered of no effect.

While it may be conceded that a statute or ordinance may be in part constitutional and in part unconstitutional, if the parts are wholly independent of each other, and that in such case the unconstitutional part only will be rejected, as

stated in 36 *Cyc.* 977, this rule is "subject to several important limitations,": 1, that the whole statute will be declared invalid where the constitutional and unconstitutional provisions are so connected and interdependent in subject matter, meaning and purpose that it cannot be presumed that the Legislature would have passed the one without the other; 2, where the invalid section is of such import that the other sections without it would cause results not contemplated or desired by the Legislature, 3, where the obnoxious part is the consideration and inducement of the whole act, or, 4, where the constitutional parts are ineffective and unenforcible in themselves in accordance with the legislative intent.

Thus in *Sherrill* vs. *O'Brien*, 188 N. Y., 185 it was held, where one part of an apportionment act violates the Constitution the entire statute thereby becomes invalid.

In *Hauser* vs. *North British & Mercantile Ins. Co.*, 152 App. Div., 91, affd. 206 N. Y., 455, those parts of the Insurance Law which undertook to regulate the insurance brokerage business were under consideration. The act provided that no person should act as agent for an underwriter who has not complied with the provisions of the Insurance Law; that every agent should procure a certificate of authority from the Superintendent of Insurance; that such certificate might be revoked by the Superintendent of Insurance for violation of any provision of the Insurance Law; that no agent whose certificate had been revoked should be entitled to another for a period of one year after such revocation, and that a license fee of $10 was to be paid by an applicant where his place of business was in a city of the first or second class. The

statute then provides, that before any broker's certificate of authority should be issued by the Superintendent of Insurance there should be filed in his office a written application for such certificate setting forth various facts, among others "(d) that the applicant is engaged or intends to engage, in good faith, principally in the insurance business, or that he conducts or intends to conduct such business in connection with a real estate agency or real estate brokerage business, and is not a salaried employee of any person, partnership, association or corporation on whose property or risks he receives or expects to receive applications for insurance, and does not make the application for a certificate of authority for the sole purpose of securing commissions on insurance written on his own property or risks." The plaintiff was a lawyer, as well as an insurance broker, and was actively engaged in the practice of his profession. It was claimed that he could not recover for his broker's commissions because of that fact. He met this contention with the proposition that the statute was unconstitutional, since it amounted to an interference with his liberty to follow a lawful pursuit. The courts decided that he was right. In the course of the discussion it was argued that, even assuming that the limitation of subdivision (d) was invalid, the remainder of the statute, which required a license, was valid. The Court, however, declined to recognize the soundness of that proposition. Mr. Justice Miller speaking for the Appellate Division, said:

> "The question then arises whether the invalid provision may be rejected, and the rest of the act saved. We would have no difficulty on that head, if, instead of requiring the statement in the application for a certificate, the

provision had simply been that a person obtaining such a certificate should make that his principal business. In that case, the invalid provision could be stricken from the act. But the requirement that the statement shall be made in the application necessarily implies that the Superintendent of Insurance shall not issue a certificate except upon an application containing the said statements. The act then provides in effect that a license must be obtained and that the Superintendent shall not issue it except upon a statement that the applicant is engaged or intends to engage principally in the insurance business or in that business in connection with a real estate brokerage business. As that restriction is thus imposed upon the issuance of a certificate, it seems to us to be a necessary part of the scheme requiring a certificate at all. For how are we able to say whether the Legislature would have required a license without imposing that condition upon its issuance? Indeed, subdivision 'd' is the only condition imposed, the other statements required in the application being merely descriptive of the applicant. While it is suggested that the Superintendent of Insurance should have ignored the invalid provision, and that he might be compelled by mandamus to issue a certificate to the plaintiff, that argument loses sight of the fact that the Legislature authorized him to issue a certificate only upon an application containing the said statement. It would hardly do to say that an administrative officer, acting upon the authority of the Legislature, should ignore the only condition imposed upon his action on the theory that the Legislature had no power to impose the condition, although but for it the authority itself might not have been conferred."

Judge Gray, speaking for the Court of Appeals, said, in the course of his opinion:

"The argument that the invalid provision may be rejected and the rest of the section preserved has been sufficiently answered by the Appellate Division. The opinion of that Court holds, in substance, that the requirement as to the statement in the application, in question, was a restriction 'imposed upon the issuance of a certificate' and was 'a necessary part of the scheme requiring a certificate at all. For how are we able to say whether the Legislature would have required a license without imposing that condition upon its issuance? * * * Subdivision 'd' is the only condition imposed; the other statements required in the application being merely descriptive of the applicant.' They say, further, in answer to the suggestion that the superintendent might ignore the invalid provision, that 'the argument loses sight of the fact that the Legislature authorized him to issue a certificate only upon an application containing the said statement.' "

See also,

*Rathbone* vs. *Wirth*, 150 N. Y., 477, 480.
*Jones* vs. *Jones*, 104 N. Y., 234;
*Lawton* vs. *Steele*, 119 N. Y., 241;
*Matter* of *Metz* vs. *Maddox*, 189 N. Y., 472.

(4) *The provision in § 174 of the statute "that in case it is judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall not affect its validity or effect of the remaining provisions of the article" does not militate against the authorities considered under the foregoing subdivisions of this Point.*

*Hill* vs. *Wallace*, 259 U. S., 70, 71.

*(5) In none of the Courts below was there any attempt to sever the license provision from the price-fixing provision. It was taken for granted that the latter was inseparable from the former, and that the license provision could not be enforced, if the price-fixing clause was invalid.*

## V.

**It is respectfully submitted that the judgment of conviction should be reversed, the proceedings dismissed, and the defendant discharged.**

LOUIS MARSHALL,
For Plaintiff-in-Error.